

1 IN THE UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION

4 _____)
5 UNITED STATES OF AMERICA)
6 VS.) CRIMINAL ACTION NO.
7 EDWARD CONSTANTINESCU) 4:22-CR-612
)
) 10:42 A.M.
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)

8 MOTION HEARING
9 BEFORE THE HONORABLE ANDREW S. HANEN
10 UNITED STATES DISTRICT JUDGE
11 SEPTEMBER 7, 2023

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PROCEEDINGS

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THE COURT: All right. Be seated. Let me unpack a

little bit here.

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All right. Counsel, we have a lot of things I want to kind of cover today, but I've -- going to follow the suggestion of Mr. Williams, who filed, on behalf of Mr. Rybarczyk, a suggested order to attack things. And his -- he actually grouped them together, which I thought was nice of him to do that, that way.

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But the -- I mean, let's get rid of the elephant in the room: The trial setting. And by "get rid of," I don't mean get rid of the trial setting necessarily, but I'm -- I have multiple motions for continuance. I have a motion to sever, which, in the alternative, requests a motion for continuance. So let's start with that.

16

17

Who wants to lead off? I mean, they're primarily the defendants'. I hear the government saying they're ready to go.

18

19

MS. CORDOVA: Your Honor, I'll start. Laura Cordova on behalf of Mitchell Hennessey. We filed the motion to sever.

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21

Mr. Hennessey has asserted his speedy trial rights. He wants to go to trial in October. This cloud of the indictment has been hanging over him since December.

23

24

25

The -- we're in this position where people are not ready to go to trial. His codefendants are not ready to go to trial because of the way the government has prosecuted this

1 case. They didn't produce the 397 episodes in the indictment --
2 they're not in the indictment. They're not alleged in the
3 indictment -- and they adamantly refused to provide the core of
4 this case, which is the false statements, until mid-June, even
5 though the defendants were indicted in December.

10 : 45 : 04 6 So our position is that the remedy is not to push this
7 out and make Mr. Hennessey suffer longer under this cloud of
8 indictment, with an ankle monitor on that beeps randomly and is
9 a serious limitation on his freedom, but to go to trial -- to go
10 to trial and, at the same time, when other codefendants are not
11 ready, understandably, it would not be fair, and it would be a
12 due process violation for Mr. Hennessey to have to proceed to
13 trial with codefendants' counsel who are not prepared to defend.
14 Therefore, we're seeking a severance and to maintain the
15 October 23rd trial date.

10 : 45 : 44 16 **THE COURT:** Okay. I hear one vote for the
17 October 23rd trial date.

10 : 45 : 53 18 **MR. ROSEN:** Judge, may I?

10 : 45 : 54 19 **THE COURT:** Yes.

10 : 46 : 05 20 **MR. ROSEN:** Briefly, Eric Rosen on behalf of
21 Mr. Rybarczyk.

10 : 46 : 09 22 There is a massive amount of evidence in this case --
23 I think well over one terabyte. We sort of stopped counting
24 recently -- a lot of it very dense trading data that must be
25 analyzed by computer program. The government has put together

1 charts --

10 : 46 : 22 2 THE COURT: Let me stop there because I've seen this,
3 and --

10 : 46 : 26 4 MR. ROSEN: Right.

10 : 46 : 27 5 THE COURT: -- and I've seen some of the exhibit
6 lists, and -- and explain to me -- and I'm not saying you're
7 wrong, but -- and I may be missing -- and you guys know the
8 facts so much better than I do. I mean, you know, in a criminal
9 case, I learn about the facts the same time the jury does,
10 basically.

10 : 46 : 56 11 But I see this -- the government's case, basically,
12 that the defendants -- and this is their contention. This is
13 not the Court making a finding -- the defendants got on the
14 Internet, pumped up the stock, and then sold it while they were
15 telling the investing public that they weren't doing that. I
16 mean, it's basically you lied, you know. You said you were
17 doing X; you were doing Y.

10 : 47 : 35 18 And so explain to me why -- and maybe it's because I
19 don't understand the government's case or the extent of the
20 government's case. Explain to me why all the trading data and
21 all this other kind of stuff, why is that -- and, I mean,
22 obviously, the defendants' trades are important because, I mean,
23 I can see the government's going to say, "At 10:00 o'clock in
24 the morning on September 23rd, you said A, B, and C, and then
25 you turned around two hours later and did something different."

10:48:12 1 So that part I understand why you do -- but what is --
2 tell me about why you need what you think you need.

10:48:18 3 **MR. ROSEN:** Sure. Well, I think you -- you nailed it,
4 Judge. The -- did they say, A, B, and C? And it wasn't that
5 they typically said that, "We're always holding," or, "We're not
6 selling." My -- I would say 90 percent of these are simply
7 opinions about what the stock is going to do in the future.
8 It's not -- in order to be convicted of this crime, you have to
9 have an intent to defraud.

10:48:42 10 Simply saying that the stock -- "I think it's great,"
11 or, "I think it's going to go to six," in our view, is -- does
12 not comprise an intent to defraud when you have significant
13 movement between the time of a tweet and when -- the time of a
14 sale. You tweet at 2:55 p.m., "I think this stock is great."
15 You might sell off some of your position at 3:00 p.m., and the
16 question is: Why did you make that sale?

10:49:08 17 The government's going to say that they were lying.
18 That's not what we're saying. We're saying most of these stocks
19 had significant movement.

10:49:15 20 You would have had to have been a fool if you did not
21 sell off a portion of your position. It's not inconsistent with
22 what you said five minutes earlier to do that, and you have to
23 take this in context of what these defendants are actually,
24 -- who they actually are.

10:49:30 25 These are not long-term investors. It's not Charles

1 Schwab or Goldman Sachs. These are day traders. Their literal
2 job is to sell quantities of stock with -- with small price
3 movements in the market to lock in trades.

10:49:45 4 If you read these books, these day trading books, it's
5 not inconsistent at all to say -- to have a positive opinion in
6 the stock and sell off half your position, because your price
7 target has been reached, and you're locking in profits or you're
8 trying to develop cash for another trade.

10:50:03 9 That's what we have to develop. That's why the minute
10 movements in the stock prices are so critical to our case,
11 because it defeats this intent to defraud.

10:50:11 12 I would agree with you, if the stock had no volatility
13 and no volume, it would be less important. It would be less
14 important if this was Microsoft, but these are not. These are
15 stocks that day traders pick particularly because the volatility
16 is so high, and that informs exactly what they're seeing inside
17 their head.

10:50:28 18 It's so critical for us to really review exactly
19 who -- you know, what's going on; who's tweeting; what's in the
20 market.

10:50:36 21 The other thing that we're seeing, Judge, is that you
22 have, you know, these level 2 trading platforms that have buys
23 and sell orders. Now, when you're a trader, you look at a lot
24 of those sell orders because you're trying to predict what the
25 price is going to do in the future. You tweet out, "I think

1 this is going to 5."

10 : 50 : 53 2 Guess what? Someone throws up a big sell order.
3 Boom. What are you going to do? You're going to try to get out
4 ahead of it or at least lock in some of your profits. Again,
5 not inconsistent with what you said, you're reacting to minute
6 changes in the market.

10 : 51 : 07 7 These are people staring at their computers all day.

8 These are people who go to the bathroom or go out for lunch, and
9 they have -- they will put up sell -- automatic sell orders
10 because they know how quickly this -- this changes.

10 : 51 : 18 11 Again, this is going to come down -- this trial's
12 going to come down to an intent to defraud and what they wanted
13 to do. That's why it's so important. We have 397 of these to
14 go through. We've prepared some charts in some of them. You
15 can see the big buy orders, and you can see the big sell orders.
16 I'm happy to produce these to the Court. I can -- we can file
17 them online --

10 : 51 : 38 18 **THE COURT:** Please don't.

10 : 51 : 39 19 **MR. ROSEN:** Yeah. I know. It will be a box.

10 : 51 : 41 20 But, you know, we're at task for this. We're
21 responsible for 397 of these. I used to prosecute
22 pump-and-dumps. One or two are typically charged in the
23 indictment. I have never seen 397. I've never seen more than
24 five or ten.

10 : 51 : 55 25 Every one of these is critical, and the

1 government's -- we're going to sit here at trial and play
2 Whac-A-Mole. We defeat one pump-and-dump; they'll come back,
3 "Oh, here's pump-and-dump 66." How do you tackle that one?
4 Well, let me get out my trading data, and I'll show you exactly
5 what happened second by second, minute by minute, everything
6 -- every time sequence is extraordinarily important when they're
7 trying to make money off very, very small intervals. So that's
8 why it's so important, Your Honor.

9 **THE COURT:** Let me ask you, while you're standing
0 there and since you raised this issue: Why am I trying 397?

7 And, you know, for us that's, obviously, you
8 know -- it would be malpractice if we said, oh, we'll just focus
9 on those 45 because the government said, you know, they're
10 reserving rights, but they're not committing to anything.
11 They've committed to nothing. We're going to be here for months
12 and months unless we narrow this case down.

23 An [sic] indictment has 19. That's plenty to go -- to
24 go to trial on. The jury will certainly get a flavor.

It's cumulative, it's prejudicial, and some of these

1 episodes, as we're going to point out in motions *in limine*, are
2 simply false. They're -- you know, there's one my client's
3 charged with \$2 million worth of stock fraud. The first thing
4 that they say was just when the stock hit its peak, he's like,
5 the stock -- you know, the stock went up 700 percent. That's
6 the first tweet, and then it goes down. He's selling,
7 obviously, but he had nothing to do with the pump. It's not
8 even alleged.

10:53:39 9 And how could he -- how could he commit fraud? We
10 have to go through each and every one. Dr. Garibotti, the
11 government's expert, has locked herself into 397. It's our job
12 to cross-examine her to show that, you know, her -- the flaws
13 and what she did wrong in this.

10:53:53 14 As another example we're going to point out in our
15 motions *in limine*, the government's charts have like all these
16 sell orders to create this huge red sequence to make it look
17 like there's this big dump. When you look at it and you
18 actually compare against the trading records, there's usually
19 just one or two sells, and they've expanded this -- because the
20 price sometimes, if you sell, say, a thousand shares, there'll
21 be a bunch of different executions, and they've expanded that to
22 make it look like there's all these different orders coming in
23 like they're sitting there dumping on the ground, but they're
24 not.

10:54:22 25 And we're charged -- we have to go through that and

1 show why it's wrong. And we're working for the motions in
2 limine on Wednesday to point out -- but there's, like -- there's
3 real issues with these exhibits.

10 : 54 : 31 4 You know, Mr. Hennessey's motion pointed out that the
5 government's text messages -- I mean, it's crazy. They've
6 spliced and diced it to make it appear that these are real text
7 message chains when they're leaving out huge portions of the
8 conversation.

10 : 54 : 46 9 I was just looking at one this morning. There's a
10 one -- one thing saying where one of the defendants is
11 purportedly defining a pump-and-dump, making it look like some
12 type of admission, where right below that he's saying, you know,
13 this wasn't a pump-and-dump, you know, that he wasn't selling at
14 this time.

10 : 55 : 01 15 I mean, it's -- it's really -- these are -- with the
16 number of -- volume of exhibits, we have to go through each and
17 every one. We have to correct the government's exhibits. We
18 have to fight about it. We're definitely going to file many
19 motions about them, motions to exclude.

10 : 55 : 15 20 There's a lot of authenticity issues that other --
21 other of my, you know, cocounsel here are going to raise
22 regarding Twitter timestamps. There was one person in the UK, I
23 think, that was controlling.

10 : 55 : 28 24 This is not a case where we can hastily rush to trial.
25 We need to flesh out all these issues, and my client's and every

1 other clients' Sixth Amendment right depend -- depends on that.

10:55:38 2 Twenty-four months is the average -- we just looked at
3 this last night. Twenty-four months is the average case going
4 to trial nationwide. This is one of the most complex cases I've
5 ever seen, I think my colleagues have ever seen doing it.

10:55:52 6 It's been ten months in October. I think, you know,
7 based on that, it would be squarely within the norm and, in
8 fact, very early just to give a couple-month extension so we can
9 raise these issues. We can tee them up. We can work with the
10 government, meet and confer about these exhibits, to make sure
11 we get it right or, otherwise, we're going to be facing 2255s
12 down the road.

10:56:12 13 And the other thing is we need to know what we're
14 facing here. They've done 397, as Your Honor points out. Say
15 they only put in 19. Is there double jeopardy issues? I mean,
16 are my clients [sic] going to be like, "If we win, are we going
17 to be charged again with the 40 going down the road?"

10:56:28 18 I mean, there's a lot of issues that we need to flesh
19 out in the indictment like this that just simply haven't been
20 raised or do -- we don't have time to raise. We would love to
21 do that, and we just need the time -- the few months,
22 respectively, for everyone to get on the same page, and we'll
23 narrow this case down so that it's reasonable and we can get out
24 of here, you know, before the -- you know, before the -- you
25 know, within a couple weeks as opposed to the many months' long

1 trial we're now facing.

10 : 56 : 57 2 **THE COURT:** Okay.

10 : 57 : 01 3 *(Sotto voce discussion between the Court and case manager.)*

10 : 57 : 21 4 **MR. LEWIS:** May I approach, Your Honor?

10 : 57 : 22 5 **THE COURT:** You may.

10 : 57 : 24 6 **MR. LEWIS:** Good morning. Your Honor, I am going to
7 elaborate very briefly upon a point that Mr. Rosen just made
8 relative to a huge issue that we face in pretrial preparation
9 given the government's proposed trial exhibits.

10 : 57 : 43 10 With the Court's permission, I brought an illustration
11 because I don't think it's fair for this Court to try to
12 evaluate the incredible need for ample time to prepare this case
13 given, as the Court said, "I don't even know about the facts
14 yet." With that said -- Rhonda, can I give the judge -- thank
15 you, ma'am.

10 : 58 : 08 16 *(Document handed to the Court.)*

10 : 58 : 21 17 **MR. LEWIS:** The government, in their disclosure of
18 trial exhibits, included the gravamen of their case, the
19 defendants' statements, largely direct messages, tweets,
20 et cetera, and I am not here to cast aspersions. That's not
21 necessary. The facts speak for themselves.

10 : 58 : 42 22 If His Honor will look at the exhibit that we have
23 compiled, I've got reams of paper of similar exhibits, but I
24 think this one will make the point for His Honor, given how
25 quick His Honor has shown to be over all the years I've known

1 him.

10 : 59 : 01 2 Mr. Rosen's statement that these pieces of evidence
3 are taken out of context could not be made any clearer by that
4 exhibit. As I said, not casting any aspersions on the
5 government, but in the monumental preparation that they have
6 already put into this case, there have been some errors made
7 relative to even who the author of said statements are. We've
8 identified a number of these.

10 : 59 : 30 9 I can tell you, Your Honor, as Mrs. Epley has been off
10 in Austin embroiled in that, I have been pouring through
11 government exhibits trying to get myself as -- up to speed. I'm
12 last to the game in this. I was -- first appeared in this case
13 in March after I finished a five-month death penalty trial in
14 Lubbock.

10 : 59 : 53 15 I assure the Court -- and I know the Court knows me.
16 I have been working as hard as one person can to get up to
17 speed. That process was greatly slowed when I had to go through
18 each and every one of these statements that my client is alleged
19 to have made in support of the conspiracy and his own
20 substantive counts and piece together the context of what was
21 really said.

11 : 00 : 21 22 I bring that to the Court's example [sic] to show you
23 it's not just the volume -- and I can assure you, Your Honor,
24 not since I represented Mr. Lay in Enron have I seen this much
25 volume of evidence.

11:00:34 1 When I saw the statistics promulgated by our U.S.
2 District Court's combined civil and criminal judicial facts and
3 figures that Mr. Rosen referenced and that Mr. Williams so
4 kindly put in his footnote of last night's pleading, I was
5 shocked because I had my office manager, this morning, look at
6 the 19 pending federal cases that I have, and none of them have
7 gone to trial or been disposed within two years.

11:01:04 8 A lot of that is outside of His Honor's control, of
9 the government's control, and of any of these defendants'
10 control because of the backlog we all suffered from COVID and
11 many of the attenuate delays that that has occasioned.

11:01:19 12 But to put this in that perspective, Your Honor, I
13 have a very robust caseload, and none of my cases -- every one
14 of my cases put together does not measure the complexity, the
15 volume of this case. I have absolutely no hesitation looking
16 the Court in the eye and telling Your Honor there is absolutely
17 no way I can properly represent Mr. Cooperman beginning on
18 October the 23rd.

11:01:44 19 And what I pledge to this Court, given my history with
20 this Court -- I think the Court has no doubt I will come -- it
21 will come to fruition. I will use the holidays. I will use the
22 time down out of court around Thanksgiving and Christmas to put
23 in 18-hour days to make sure I'm ready, but I tell the Court,
24 without reservation -- and I can go on and on, but I don't
25 believe in beating a dead horse. I know this Court listens

1 acutely to what is said.

11:02:12 2 I simply cannot give Mr. Cooperman, a young man that's
 3 never before been in trouble in his entire life, facing arguably
 4 one of the most novel theories of prosecutions we have anywhere
 5 in American jurisprudence today -- with the current schedule. I
 6 will answer any questions for this fine Court, should the Court
 7 have any, but I wanted to point out --

11:02:35 8 **THE COURT:** Walk me through what you handed me.

11:02:39 9 **MR. LEWIS:** Yes, Your Honor. What we have here: The
 10 government's exhibit is on the right where it says, "Government
 11 Recreation." The "real" is going back to my client's own phone,
 12 pulling these same text messages, and the real time off of his
 13 phone. I used the red boxes, Your Honor, to illustrate the
 14 differences so that the Court can see this is not just taking
 15 out one or two statements within a conversation. These are
 16 multiples.

11:03:11 17 And like I said, no need to cast aspersions. They put
 18 together their exhibits the way they want to. The Court will
 19 determine if they're admissible.

11:03:17 20 My problem is the hours and hours that I had to spend
 21 with my client to put together what the texts really were, and
 22 it's indicative of why this is such a Herculean task, as I told
 23 you, and I'm not -- I'm not trying to master or wax hyperbolic,
 24 Your Honor. The fact of the matter is the government has very
 25 adroitly presented this Court that this is a simple

1 pump-and-dump.

11:03:48 2 I am not a securities lawyer by nature. I am a trial
3 lawyer. So I am learning a lot about some of the specific
4 securities laws germane to this case, but in doing so I can tell
5 this Court, as a trial lawyer, there is absolutely no way I can
6 be ready, even given the pace of the work that I am on, on
7 October the 23rd of this year.

11:04:13 8 The significance of those text messages was to show
9 you those are the bulk of the government's trial exhibits. I
10 think they're the first few hundred.

11:04:22 11 So as I said, I've got reams of paper of these that
12 illustrate the amount of work that has to be done to go back and
13 make sure what their trial exhibit is, we have a proper
14 objection, we have authentication, and I can talk to my client
15 intelligently about, "What were you saying before this tweet
16 that makes it make sense?"

11:04:44 17 Because as Mr. Rosen said, you're going to be talking
18 about not minutes, not hours, we're going to be talking about
19 seconds in this trial when, in fact, relative to my client, we
20 have found, relative to the five substantive counts he's
21 indicted on, Your Honor, there are episodes wherein he has made
22 a statement of opinion about his feeling on a stock, and he's
23 acted consistently with that to his purchase.

11:05:10 24 He's then sold. Well, guess what happens minutes
25 later? He's bought again. And that's part of the entire

1 context that we -- it is incumbent upon us to be prepared to
2 present to the jury.

11:05:22 3 So it's not as simple as look at the trading records;
4 he made this statement; then what did he do. What was he doing
5 beforehand? What is he doing in the seconds after hand? I
6 think that will be very impactful for the trier of fact.

11:05:35 7 Thank you, Your Honor.

11:05:39 8 **MS. SOLANO:** Your Honor, may I approach?

11:05:40 9 **THE COURT:** You may.

11:05:47 10 **MS. SOLANO:** Good morning, Your Honor. My name is
11 Jamie Solano. I'm new to this case, but I represent Edward
12 Constantinescu. I would just like to add a few more issues that
13 are specific to this time period that we find ourselves in
14 immediately prior to trial and why the defense, or at least our
15 team, can't be ready by the trial date.

11:06:09 16 In addition to the issue relayed with the text
17 messages and the text messages not lining up, the reason why
18 that matters so much in this case, Your Honor, is because the
19 government's made a decision, on its exhibit list, not to
20 include the underlying substantive evidence. And so this isn't
21 a case --

11:06:29 22 **THE COURT:** Meaning?

11:06:31 23 **MS. SOLANO:** What I mean by that, Your Honor, is that
24 the government's exhibits, the majority of them, are recreated,
25 and they didn't -- it's not like a typical case where they've

1 got all of the underlying trading records or the screen grab of
2 the actual text message or five screen grabs of the actual text
3 message, and then they've put it all together in a summary.

11:06:51 4 They just included the summary, and in doing that,
5 every single one of these summary exhibits, we have to go back
6 into the millions and millions of records, some of which the
7 data is so voluminous our team doesn't have access to right now,
8 and we have to go find where it is, and then we have to line it
9 up and see if it's actually accurate.

11:07:13 10 And there are several occasions which that preliminary
11 step has been done, and it is not accurate. And when we're
12 talking about 900-plus, a thousand exhibits where we have to go
13 redo this, and we don't have the underlying bases, that makes
14 our job incredibly difficult as defense attorneys to be in a
15 position where we can explain this is a misleading exhibit,
16 Your Honor.

11:07:36 17 In addition, the government's made several productions
18 after the production deadline, and each time it makes these
19 productions, it creates more and more issues that we have to dig
20 into. And, Your Honor, I was an AUSA up until two and a half
21 months ago, so I understand that it is difficult, and as you get
22 ready for trial, things come up.

11:07:56 23 But by way of one example, we received a production on
24 August 16th. So a few weeks ago. It's the government's 20th
25 production letter saying that they're producing additional

1 materials that relate to their testifying witnesses and material
2 that they obtained as a result of the search warrants in the
3 case.

11:08:15 4 Now, there's at least two things that are very
5 problematic about this August 16th production. One of them is,
6 buried within it, is an e-mail from their government -- from one
7 of the government's testifying witnesses to the lead prosecutor
8 in this case, and it's from September of 2022. And in that
9 e-mail, this government witness who is going to be testifying
10 about the tweets and the data that he analyzed, says, quote, I
11 don't want to hold up this delivery, but I want to note that I
12 noticed some discrepancies in the timestamps of some of the
13 tweets as reported by Axiom, while checking over the results.
14 If the timestamps of certain tweets are important, I would
15 recommend referring back to the original text files from
16 Twitter. I can walk you through that process, if necessary.

11:09:03 17 Now, Your Honor, what this means -- or what this seems
18 to mean is that there was a forensic tool run against the data
19 that the government obtained from Twitter, and there is -- when
20 you look at the reports from that forensic tool, there's a
21 problem with the timestamps. If that's the case, Your Honor,
22 then we need -- we did not know that there was a problem with
23 the timestamps, and so to the extent the government has produced
24 these exports, which it appears from the production they have,
25 and there's any discrepancy with the timestamps, we need to make

1 sure that we have sufficient time to go back and look at the
2 underlying text files that came from Twitter to see if there's a
3 discrepancy that matters to the timing of these trades and the
4 timing of the tweets.

11:09:53 5 So that's one -- that's one problem, Your Honor.

6 There's an additional issue based on what it looks like the
7 government was doing in producing and processing the data, which
8 relates to a suppression issue, which I'm not going to put
9 before Your Honor in this moment, but the point is, Your Honor,
10 each and every time the government has added new productions and
11 new information to us, it has left us with more things that we
12 have to -- that we have to research; more issues that we have to
13 compare. And this is not an instance where we can look at the
14 exhibit list, we have the summary, we can compare the summary to
15 the underlying evidence, the underlying exhibits that are
16 supposed to represent that, and see if we think there's a
17 discrepancy.

11:10:42 18 We are forced to look at only summary exhibits, and
19 then we have to go crawl back into a massive database, some of
20 which, at least for our team, is not currently accessible to us,
21 and we have to see if we can line it up --

11:10:57 22 **THE COURT:** Why is that? Why is it not accessible?

11:11:00 23 **MS. SOLANO:** Because certain of the data is too dense,
24 and so we have -- we were not able to open some of the
25 government's productions. So we had to send it out to a

1 third-party processor. Currently, the third-party processor has
2 those productions in a database, but because some of the files
3 are electronic and so large, we are not able to actually view
4 them, nor are we able to download them.

11:11:22 5 We were okay with this strategy for now because we
6 wanted to wait and see what would actually end up on the
7 government's exhibit list, and then you can see if this is
8 actually a problem or if this is electronic data that,
9 ultimately, doesn't really matter, and because there are
10 synthesized export reports of some of this material.

11:11:42 11 However, when we got the government's exhibits, the
12 government did not put its underlying evidence as the exhibits.
13 It only has these summaries, and so we are now forced to go back
14 in through the productions. Now we have a concern whether
15 there's a timestamp problem with some of the exports that the
16 government has produced, so we shouldn't be relying on those,
17 and now we have to go back and -- so that we can check and make
18 sure that each of these actually say what the government says
19 they -- they are reflecting, and that's an enormous task.

11:12:17 20 And in addition, Your Honor, these summary charts,
21 which we're not -- I'm not going to get into at length, but the
22 summary charts with the trades, they have, as -- as Mr. Rosen
23 highlighted, they've got all these sells and all these buys, but
24 they also have tweets that are pulled in and interchanged and
25 intermingled. And the way in which they -- the defendants are

1 kind of lumped into each of these episodes, sometimes the
 2 defendant is lumped into an episode when he hasn't said anything
 3 alleged to be false at all.

11:12:54 4 And so this isn't a situation where, Well, you knew
 5 that we -- you know, we had this synthesized list of false
 6 statements, so you knew that that is what was going to be the
 7 issue, and so you could have focused on that. Now we have to
 8 look at our client involved in episodes picked up by the
 9 government where he didn't say anything false at all, and they
 10 don't even contest that he didn't say anything false at all.
 11 But now we have to also put our attention on those episodes in
 12 addition to what we thought -- where we thought the ball was
 13 headed in -- to begin with.

11:13:27 14 So under those circumstances, Your Honor, and for
 15 those reasons, our team needs a continuance in this case.

11:13:45 16 **MR. FERTITTA:** Good morning, Your Honor. I'm Zachary
 17 Fertitta. I represent Gary Deel. We also have a motion for
 18 continuance, and my comments will echo those of cocounsel's.

11:13:58 19 Part of the problem here is in data handling. I'm
 20 going to approach this from strictly a data-driven standpoint.
 21 We've received 20 productions over the course of seven months,
 22 and I compliment the DOJ on their hard work. We -- and the
 23 massive volume of that.

11:14:21 24 We need time to assess that data. We need time to do
 25 the same volume of work, perhaps even more. Here's why: Each

1 of these productions are password protected. There are
2 thousands of files where a password has to be entered in order
3 to access the data. Some of the data is enormous.

11:14:44 4 So then we have to take that sometimes to third
5 parties, but we -- I've assembled an entire data processing
6 team. They are not working normal hours. They're working well
7 beyond normal hours to process this data.

11:14:58 8 Absent from the government's production is real market
9 data, and I can get very specific on that. If you'll -- I filed
10 an affidavit from one of our team members yesterday in which he
11 details -- and I -- I'll just -- I'll be brief in this. He
12 details some of the data that is missing from the government's
13 production -- real market data.

11:15:21 14 Specifically, with the stock ticker TRCH, during the
15 relevant trading period that -- that is referred to in the
16 superseding indictment, there is an article posted on
17 Nasdaq.com, the official website for Nasdaq, where the title of
18 it is "Torchlight Energy shares are blazing higher today."

11:15:52 19 That article details real market factors and corporate
20 information. That's a real data point. That is a real market
21 moving fact when it's on Nasdaq.com.

11:16:06 22 If you -- also at that time, Mr. Lewis's client, it is
23 alleged, was posting about TRCH. It is alleged in the
24 indictment he had 125,000 Twitter followers. At the time he
25 traded and posted about TRCH, he actually had 4,500 Twitter

1 followers. That's a big gap.

11:16:38 2 It's hard to move the market with 4,500 Twitter
3 followers. I don't think that's going to happen.

11:16:45 4 These are the market -- these are the real data points
5 that we have to go and use external sources to find to fill in
6 these gaps.

11:16:58 7 Also, not included in any of the government's material
8 are -- is the notion that there may be bots involved in Twitter
9 followings. Now, there's a lot of debate over the percentage of
10 bots, but there is zero data in the government's production
11 related to bots and how many of their Twitter followers were
12 actually bots.

11:17:19 13 So you've got a multi-disciplined approach that we
14 have to take to get accurate data, both market data at the time
15 of these trades, Twitter data at the time of these trades, and
16 how that could potentially impact the market, and this takes an
17 enormous amount of time multiplied times seven codefendants, 20
18 productions, and 397 discrete trading incidents that have been
19 given to us. We can't take the chance of not doing that
20 research. In order to give an effective defense, we have to dig
21 in and do this research and look to all these external market --
22 market and data points.

11:18:07 23 Also missing from the government's production is all
24 of the data from -- the coding data from the Atlas Discord
25 channel which was taken down. All these posts took -- a lot of

1 these posts at issue took place on the Atlas platform. We don't
2 have access to a lot of that data. We have to go find it, and
3 we are actively doing that.

11:18:31 4 The underlying code will -- will give us warnings,
5 subscriber agreements, the agreements and attestations that the
6 subscribers had to sign and acknowledge, and educational
7 resources that were made available to them, which is absent from
8 the government's production, warnings -- all of these things are
9 absent from the government's production that we have to go seek
10 out on our own. It takes a lot of time. We are working very
11 diligently, but this is a huge task.

11:19:12 12 To say it's complicated is the understatement of the
13 year. It is a Herculean task, and for that reason,
14 Mr. Cooperman and Mr. Matlock filed jointly asking for a
15 continuance. Thank you.

11:19:26 16 **THE COURT:** Ms. Cordova, you don't have to do any of
17 this?

11:19:30 18 **MS. CORDOVA:** Your Honor, I agree with everything
19 they've said about the government's production. In my
20 experience, and what we would ask the Court, is that the proper
21 remedy is exclusion; it's not allowing the government more time
22 making the defendants suffer longer under this indictment. The
23 government waited six months, till June, to even identify these
24 purportedly false statements. That's not how it's supposed to
25 work under the Speedy Trial Act. The government's supposed to

1 be ready to go within 60 days.

11:19:55 2 They clearly were not, and that should not be
3 something that prejudices our -- our clients. They get a speedy
4 trial. That's their constitutional right, and the fact that the
5 government has created all these issues, the -- the solution is
6 exclusion. Go back to the indictment. We still have a motion
7 to dismiss on the counts where the government never even
8 identified in the indictment false statements by our client or
9 what -- when the trades were, anything.

11:20:25 10 None of that is in the indictment, and so our
11 position, and what we would ask the Court, is that we go to
12 trial in October, and we exclude -- if they don't produce the
13 Jencks material for their testifying agent, he doesn't get to
14 testify. In our experience, and my experience as a former
15 federal prosecutor and as a defense attorney, that's the proper
16 remedy, not to violate the defendants' Sixth Amendment rights by
17 forcing them to wait longer for the government to get their case
18 together.

11:20:51 19 **THE COURT:** Anybody else from the defense want to
20 weigh in before I let the government respond?

11:20:57 21 **MR. REYES:** Thank you, Your Honor. Just briefly,
22 Your Honor, "Lu" Reyes -- or Luis Reyes on behalf of Mr. Perry
23 Matlock.

11:21:09 24 We had filed and joined the motion that Mr. Fertitta
25 had just explained to the Court, the bases of -- for his claim,

1 Mr. Deel. But I did want to add a couple things, and I'll make
2 it brief because you've already heard a lot of the
3 technicalities involved in this case.

11:21:24 4 But, Your Honor, this really is a Sixth Amendment
5 issue. For the reasons you've heard my colleagues explain,
6 there is a very real concern that we cannot provide the
7 effective assistance by October 23. So in case anyone's
8 counting, we would tally a vote in that favor for the
9 continuance.

11:21:45 10 But to be brief, Your Honor, the complexity is
11 something we've not seen before, but there's some very, very
12 important things that have happened just in the last -- less
13 than a month, and that -- what my colleagues talked about in
14 terms of the exhibits just three weeks ago that we received have
15 evidence -- purported evidence that they would want to take back
16 into the jury room that isn't even accurate.

11:22:09 17 But what we're having to do is go through all of
18 those, every single one, to make sure we understand the bases
19 and, of course, challenge it as appropriate, which takes away
20 time.

11:22:20 21 But the timestamps that -- that Mr. Constantinescu's
22 attorney talked about is extremely important as well. What
23 we're talking about are statements -- a review of behavior with
24 statements made at a certain second in the day, and then buying
25 and then trading volume right after. If those aren't correct in

1 the time, that changes the whole bases of how we're going to
2 approach our case, and it could strengthen -- it could
3 strengthen our case quite a bit one way or the -- you know, at
4 least depending on how these things are actually -- so we need
5 the actual time. We need to actually go back through.

11:22:59 6 But I would be remiss, Your Honor -- and this is my
7 final point -- if I didn't mention that another reason for
8 continuance is that there are currently motions for Brady
9 material pending, and -- and I will let, you know, Mr. O'Brien
10 [sic] or Mr. Constantinescu's counsel talk in more detail about
11 this. It was their motion which we joined, but it's very
12 crucial material that we believe is crucial to the defense, and
13 that has to do with the fact that the SEC has stated that there
14 are -- it is not determined what may have caused the buying
15 volume on certain of the underlying stocks in the government's
16 case, and that is information that the jury has to hear.

11:23:43 17 And what we need, Your Honor, and what's the basis of
18 that motion is the -- the SEC documents that -- their analysis.
19 They put together seven factors. They put together reports. We
20 don't have it, and our position is that this was a joint
21 investigation that the FBI did with SEC, that they have these
22 documents or they have access to them, and that we need them
23 before we can go to trial.

11:24:05 24 That was the basis of a motion filed in July, and, you
25 know, we really need that before we go to trial. It goes to the

1 causation of -- the underlying causation, which they have made
2 very clearly a point in their case, that our guys caused,
3 somehow, the market to move; that our guys caused, somehow, for
4 there to be harm. There's actually clear exculpatory evidence
5 out there that we haven't received yet that they -- by the
6 government itself that we need to have in our hands and that a
7 jury would need to see.

11:24:37 8 And with that, Your Honor, I appreciate the Court's
9 attention.

11:24:45 10 **MR. MALLETT:** May I approach, Your Honor?

11:24:46 11 **THE COURT:** You may.

11:24:49 12 **MR. MALLETT:** Good morning. I'm Edward Mallett. I'm
13 here with Mr. Stefan Hrvatin, who's sitting on the front to the
14 Court's right.

11:24:58 15 I am mindful of the Court's comment that you often
16 learn about the case the same time the jury does, but I would
17 not want the defense to learn about the government's case at the
18 same time the jury does.

11:25:19 19 Our motion to adopt the other motion for continuance
20 is general, and it's document No. 383. I want to start, though,
21 by saying this: Mr. Hrvatin is a day trader. That means he
22 trades in and out of an identical stock multiple times on the
23 same day, often making a very small profit or taking a small
24 loss on individual trades.

11:25:53 25 In the records the government has kindly shared with

1 us, and in records Mr. Hrvatin is able to provide, I have found
2 cases where he's bought or sold the same stock in what we call
3 "round trips," 15 to 20 times in the same day. Sometimes he
4 will sell a stock for a small profit, and then, a few minutes
5 later, buy the same stock at a higher price than he just sold
6 for because if he can make \$2,000 on a \$100,000 position -- a
7 2 percent gain -- and do that ten times, he's made \$20,000 in
8 one day. That's pretty good by the hour.

11:26:36 9 He's cautious to watch carefully and use limit orders
10 to both buy at a good price and get out if the market moves
11 against him.

11:26:47 12 Also, Mr. Hrvatin never recommends or tells anyone who
13 is interested in his Twitter postings to buy a stock. He will
14 state, as the evidence will show, that he believes a particular
15 stock is good, but that doesn't mean that it's good. In fact,
16 other market forces may cause him to be proven incorrect.

11:27:12 17 He only has to be correct most of the time to
18 have -- make a living as a day trader, working in his home,
19 constantly trading in and out of the stocks that he is favoring
20 in a particular period of time. So those are facts that the
21 Court needs to know about at least one defendant, and the only
22 defendant for whom I speak.

11:27:37 23 He is not in partnership, collaboration, or conspiracy
24 with the others. He is trading on his own.

11:27:43 25 In the motions pending are requests for the trading

1 records of the codefendants because I believe that if they will
2 be produced by the government -- and I believe the government
3 has them. And if they don't have them, I don't know why they
4 don't -- we can show that he is -- trades independently of the
5 activity of codefendants.

11:28:07 6 Now, my motion starts with this declaration: Haste
7 makes waste. And I chide the government, and now I'm kind of
8 embarrassed about it, for titling a motion a response to
9 Constantinescu's motion to compel when it's really an opposition
10 to Rybarczyk's motion for continuance and Hennessey's motion for
11 severance. So haste makes waste when lawyers are trying to meet
12 deadlines and get things filed as promptly as possible.

11:28:40 13 In my particular case, we filed an exhibit list,
14 No. 388, in which item 21 says defendant's e-mails to be
15 selected and filed. That's a mistake. The government kindly
16 has agreed not to oppose a motion to amend the exhibit list and
17 change the word "e-mails" to "tweets." That's my mistake trying
18 to get it done.

11:29:08 19 Yesterday, one day late, I was able to speak to the
20 witnesses that Mr. Hrvatin had recommended would be helpful to
21 him, interview them by phone, and file an unopposed motion to
22 extend the date from the 5th to the 6th, and that is pending.
23 The government doesn't oppose it. Haste makes waste. I didn't
24 get it done on the 5th. I just ran out of time.

11:29:38 25 The government produces discovery in the most helpful

1 way it can. We ask for something, and they send us something.
2 For example, I'm not complaining about their violating the
3 discovery cutoff of June 5th, but I'm holding an envelope that
4 was mailed out on -- dated August 29th for overnight delivery,
5 and it explains inside that this disk -- I'm holding up an
6 envelope, and it has what we call a thumb drive in it.

11:30:09 7 And they explain in the letter that the material on
8 this particular thumb drive are provided in response to what
9 another defendant requested and that we will soon be provided
10 the password to this thumb drive by e-mail. Now, I can't defend
11 and always say the government is right and never makes mistakes.
12 They provide the discovery. I need to at least take a look at
13 it.

11:30:37 14 I'm not aware that we have yet to receive the password
15 for what I have numbered production No. 22, and I -- it may be
16 23, but I -- as their envelopes come in, I write down numbers.
17 So in my motion I state, at paragraph 2, that I am several
18 productions behind. I've got envelopes like this.

11:31:00 19 Now, I am just a solo practitioner. I am sharing
20 expenses with other lawyers. I have retained and paid and am
21 paying by the hour an information technology consultant to
22 assist me in getting these materials.

11:31:16 23 He advises that if the timestamps on the spreadsheets
24 provided by the government lack integrity, then they will not
25 truthfully report the actual time that Mr. Hrvatin traded in a

1 stock. That concerns me because he is doing this rapid-fire
2 trading all day long trying to profit and, in fact, profiting on
3 small margins.

11:31:48 4 I may be corrected by the government, but I think it's
5 in their expert report that, in materials she studied, he
6 profited \$600,000 and change about which they have complaints.
7 That is a small figure for a three-year period of time in which
8 they are claiming that others made a great deal more money. The
9 very variance between his income and the income of the others I
10 think puts -- rebuts the claim that he is acting in some kind of
11 partnership with other people in violation of the law.

11:32:29 12 I do have other cases. I've stopped taking other
13 cases. I stopped in July. I declined a case yesterday when I
14 got a call from the magistrate's court.

11:32:41 15 I'll work on this full-time. I think we can make that
16 possible. We've budgeted it because we knew it would be
17 protracted litigation, but I need to learn about it before the
18 trial and not during the trial. If I do not, then I fear his
19 constitutional rights to effective assistance of counsel and due
20 process of law will be in jeopardy. Therefore, we ask the Court
21 for additional time.

11:33:17 22 **THE COURT:** Who wants to respond from the government?

11:33:21 23 **MR. ARMSTRONG:** Thank you, Your Honor. Good morning,
24 Scott Armstrong for the record.

11:33:24 25 There is a lot to respond to in all of that. I think

1 that just sitting here listening to it, it's unique in that the
2 issues that are being described are intelligent issues, and the
3 issues that are being described are not unique issues, and the
4 issues that are being described, 45 days from trial, are not
5 issues that cannot adequately be resolved and prepared for in
6 the normal course, given the steps that we have taken in this
7 case to tee up every single one of these issues, such as the
8 trading records, such as the social media posts, and producing
9 and giving defendants exhibits in this case 45 days -- I'm
10 sorry, 75 days before trial as Your Honor requested.

11 : 34 : 17 11 That is two and a half months before trial, an almost
12 unheard of production deadline, and we haven't gone back, and we
13 haven't said, "Oh, by the way, we want to add these exhibits,"
14 or, "Oh, by the way, we left off ten exhibits here or, you know,
15 nine exhibits there." We tried to be as faithful as we could to
16 the deadline and given exhibits 75 days before trial.

11 : 34 : 42 17 And so a lot of this stuff that we're hearing right
18 now in this hearing is just a complete sideshow and completely
19 irrelevant to what the actual evidence will be at trial and what
20 is actually admissible at trial.

11 : 34 : 54 21 Just taking some examples that we heard this morning
22 from Mr. Rosen: How is it possible that it is relevant evidence
23 to just introduce random statements from who knows who about
24 stocks; or Mr. Cooperman's attorney, his example about --
25 Mr. Lewis, his example about how press releases are just

1 admissible?

11:35:16 2 There has to be some foundational hook that the
3 defendant actually saw this material. You can't just wholesale
4 dump in evidence from who knows where from what corner of the
5 Internet and say that's admissible evidence and not hearsay. So
6 to a large extent, a lot of these issues --

11:35:31 7 **THE COURT:** They're saying that about your summaries
8 as well.

11:35:36 9 **MR. ARMSTRONG:** Understood, Your Honor, but our
10 summaries are categorically different. Our summaries are their
11 own statements and their own trades. I think that -- that comes
12 in all day under 801(d)(2)(E) and 801(d)(2)(A). So there's a
13 categorical difference between a press release grabbed from the
14 Internet and the defendants' own statements.

11:35:58 15 On Ms. Cordova's point about we were, you know,
16 dilatory in producing the false statements, you know, sometimes
17 there's selective amnesia, but my recollection is we all sat in
18 the courtroom and decided, back in March, the exact date we
19 would be producing our expert report that would include the
20 false statements. So to cry foul after we complied with that
21 and produced them in June strikes me as a little bit untoward.

11:36:23 22 Your Honor, there -- I have tons of issues here that I
23 can discuss. I don't think Your Honor wants to hear about all
24 of them, but I'm happy to address them --

11:36:29 25 **THE COURT:** Let's take the severance issue.

11:36:31 1 **MR. ARMSTRONG:** Okay.

11:36:33 2 **THE COURT:** We have a motion to sever, and Ms. Cordova
3 says she's ready to go to trial.

11:36:39 4 **MR. ARMSTRONG:** Your Honor, how is that not compelling
5 evidence that if you want to be ready, you can be ready? On the
6 law, I think that she is incorrect in that. The law in the
7 Fifth Circuit, and even in the Supreme Court, is clear that you
8 have to show compelling prejudice -- the most compelling
9 prejudice, and that normally comes when you have irreconcilable
10 or mutually antagonistic defenses.

11:37:03 11 So, for example, if you have two defendants, and one
12 says, "The other defendant shot the guy, not me," that's a good
13 example for a severance. But just saying, "I want to go on my
14 own schedule. Everyone else can do what they like," is not
15 compelling prejudice of the most significant degree to warrant a
16 severance, especially --

11:37:21 17 **THE COURT:** The fact it's been designated a complex
18 case, does that get you around any speedy trial issue?

11:37:29 19 **MR. ARMSTRONG:** In what sense, Your Honor?

11:37:30 20 **THE COURT:** Well, she's saying her client's speedy
21 trial rights have been violated.

11:37:40 22 **MR. ARMSTRONG:** I'm definitely not a speedy trial
23 guru, but I would say that they're tried together in a
24 conspiracy, and the Supreme Court law that I'm aware of is that
25 if you are tried together in a conspiracy, the general rule is

1 that everyone goes to trial together and that any intervening
2 time is, therefore, tolled until everyone is ready to go.

11:38:05 3 Your Honor, there are a number of issues I can
4 address, you know. The gravamen of this case and the difficulty
5 in this case is that we produced things very, very early, and,
6 you know, I'm not going to sit here and, you know, take pot
7 shots, but we did that for a reason, and now we're being told,
8 oh, by the way, no one's ready. And the reason why no one's
9 ready is for reasons that, quite frankly, don't bear a lot of
10 fruit and aren't very compelling when they're trying to chase
11 issues and chase causation examples and chase causation theories
12 that should not be admissible in the first place.

11:38:45 13 **THE COURT:** All right. Let's shift over before I talk
14 about the trial setting. I've heard two -- I think
15 Constantinescu has -- Mr. Williams, maybe it's you -- have the
16 most -- you have the most motions to compel outstanding.

11:39:10 17 **MR. WILLIAMS:** No, Your Honor. Those are
18 Mr. Constantinescu's motions to compel, Mr. --

11:39:14 19 **THE COURT:** Okay.

11:39:14 20 **MR. WILLIAMS:** We have a motion related to the
21 evidence that if -- in the event -- in the event continuance is
22 denied, but we'll defer on that till your trial --

11:39:23 23 **THE COURT:** Let's talk about -- go ahead and have a
24 seat, Mr. Armstrong. Let's talk about -- because I think this
25 ties in to when we go to trial. If they're missing evidence, I

1 want to know what it is. So tell me what you -- issues you
2 think exist.

11:39:41 3 **MR. FORD:** Well, I can say with a high degree of
4 certainty that it exists. We currently have three outstanding
5 Brady motions of material that we know exist and we believe it's
6 highly exculpatory. That's why we've brought it to the Court's
7 attention. I'm going to allow my colleague, Ms. Solano, to
8 speak about one of them. I'd like to speak about the most
9 important, which is our second motion to compel Brady material
10 related to the SEC's finding -- findings about the exact stocks
11 that we're talking about here today.

11:40:12 12 I'll start by saying I'm actually shocked by what
13 Mr. Armstrong just said to conclude his presentation, that he
14 does not believe causation is at issue. I'm shocked for two
15 reasons. First is this cutesy term "pump-and-dump" that we
16 hear.

11:40:28 17 It has historically been used in the securities field
18 to describe a specific type of securities fraud, one in which
19 false statements are issued by an insider which causes the price
20 to go up. The sales by the insider then cause the stock to go
21 down. That's how we came up with that cute term.

11:40:51 22 If we are not talking about these individual
23 defendants causing the changes in price of these stocks, there
24 are no profits, and there are no losses attributable to them,
25 then we are here -- after thousands of newspaper articles

1 smearing my client's name, we are here talking about what could
2 be no more, after trial, than a technical violation for which
3 nobody made any money and nobody suffered any losses.

11:41:20 4 So we have received the government's expert reports.

5 The expert reports do not disclose that they will be speaking
6 about causation; however, the exhibit list tells a different
7 story. And each of these so-called exhibits, which are actually
8 fabricated pieces of evidence by the government -- each one of
9 them suggest that the government is going to put on a causation
10 case whereby they say that my client said, "Hey, here's a stock,
11 and here's a little meme about it." That's what caused the
12 price to go up, and people bought it, and when the price went
13 down, they lost money.

11:41:58 14 That's going to be their case. They're going to try
15 and back-door it. Whatever Mr. Armstrong just said when we go
16 to trial, I can assure you he's going to try and back-door this
17 causation issue. That's -- brings me to the motion to compel.

11:42:11 18 They allege that Mr. Constantinescu made \$80 million
19 as part of this scheme. I have attributed no less than
20 59 million of that to stocks that the Securities and Exchange
21 Commission looked at and determined were meme stocks for which
22 the volume and price increases were indeterminate. In fact,
23 Maxine Waters, in -- very early in 2021, in February, she
24 ordered a congressional hearing on this. There was a Senate
25 follow-on.

11:42:37 1 During that, there was -- former chair of the SEC
2 testified, the then-acting SEC chair submitted letters, and now
3 the current SEC chair, Gary Gensler, came and testified to
4 Congress.

11:42:52 5 The issue before the Congress was these -- these meme
6 stocks, GameStop, AMC, NAKD, Sundial, Express, JAGX, what caused
7 this to happen? And the chair of the SEC stood up and said
8 there was a lot of things that caused it to happen --

11:43:11 9 **THE COURT:** Okay. But those aren't at issue here,
10 though, are they?

11:43:14 11 **MR. FORD:** Oh, they are. That is --

11:43:16 12 **THE COURT:** GameStop is at issue here?

11:43:17 13 **MR. FORD:** No. AM- -- NAKD, my client made
14 \$9.7 million. Between January -- between January of 2021 and
15 March 1st of 2021, my client made over \$50 million primarily on
16 a handful of stocks. NAKD, he made over 9,000,000. Sundial, he
17 made over 17,000,000. Express, he made over 3,000,000. And I
18 can go down the list, all meme stocks.

11:43:41 19 Those are listed in the government's calculation of
20 their \$114 million number, and they are listed in the 397
21 episodes.

11:43:52 22 **THE COURT:** Okay. They're not in the indictment,
23 though?

11:43:54 24 **MR. FORD:** They are not in the indictment.

11:43:56 25 **THE COURT:** Okay. Well, see, this is where I'm at a

1 disadvantage. You guys know about 397. I know about the ten or
2 11 that are listed in the indictment.

11:44:04 3 **MR. FORD:** Right.

11:44:04 4 And what they -- what they've said in their filings
5 now, though, is that they plan to use those 397 as proof of
6 the -- as proof of the conspiracy, one, and then as 404(b). So
7 they do plan on coming in and talking about these stocks. This
8 is a major issue in this case because the manner in which my
9 client talked about and traded stocks -- those stocks is no
10 different than any of the other ones. And we will see, as you
11 learn the facts, that the way my client traded is very different
12 than anything that the government is -- is presenting.

11:44:38 13 The issue is this: There is no doubt -- no doubt,
14 based on what we submitted to the Court, that the SEC, the DOJ,
15 and the FBI have been involved in a joint investigation. In
16 fact, the way it appears to us is that the SEC has been driving
17 the bus.

11:44:52 18 Within weeks of the DOJ opening this case, they were
19 on the phone with the SEC requesting the information. Our first
20 production from the government, almost all SEC materials. They
21 have been in active communication with the SEC throughout the
22 duration. It's where they've found their defendants; it's where
23 they found many of their supposed victims; it's how they
24 obtained trade records, Twitter, Atlas, and Discord records; how
25 they obtained search warrants. They conducted at least over a

1 dozen interviews jointly with the SEC.

11:45:26 2 They did an investigation with the SEC. They issued
3 their charging instruments on the exact same day, December 14th,
4 2022, which, not by coincidence, the chair of the SEC put a
5 video out and a press release on the same exact day that these
6 guys were indicted saying that they were altering the rules on
7 dark pool trading and, subsequently, that they would be altering
8 the rules on short selling in order to deal with the meme stock
9 phenomenon that occurred throughout 2021.

11:45:55 10 Your Honor, I believe that once I have access to this
11 exculpatory information in the SEC's possession, I can show that
12 at least 75,000,000 of the 80,000,000 attributable to my client
13 came from stocks that the SEC investigated and determined
14 experienced price increases and decreases because of factors
15 that had nothing to do and were far outside of the control of my
16 client. That other 5,000,000, truthfully, it's stuff he didn't
17 really talk about. I don't know how it ended up in this case.

11:46:28 18 But this causation issue, we have got to make a
19 decision, and I think we've got to make it here today. We
20 either exclude the causation element, the government cannot say
21 that these guys caused the price to go up and down, and,
22 therefore, we have no profit and no loss -- that's one option --
23 or, two, we need access to all of the SEC's investigatory file
24 over the past two and a half years when they investigated these
25 episodes.

11:46:56 1 But I -- we do not think that it is reasonable or fair
2 to allow the government to stand up and say my client made
3 \$80 million or, combined, these gentlemen made \$114 million when
4 I now know that the overwhelming majority -- overwhelming
5 majority of what my client made came from what the SEC has
6 deemed to be meme stocks that were caused by many, many factors,
7 none of which had anything to do with Mr. Constantinescu.

11:47:21 8 **THE COURT:** What's your position on whether these
9 stocks not mentioned in the indictment should be -- even be
10 admissible?

11:47:31 11 **MR. FORD:** I don't think they should be admissible. I
12 agree with Mr. Rybarczyk's attorneys on that point. I don't
13 think we should be discussing them.

11:47:38 14 The problem that we get, then, is now they just
15 dragged my client through the mud for \$80 million, and we're
16 going to show up at trial, and they'll be hard-pressed to -- to
17 even come up with evidence on a few hundred thousand, because
18 I'm telling you all of this money that he made, he bought stocks
19 and held them during these huge waves of this meme stock
20 phenomenon, and that's where all that money came from.

11:48:01 21 They should not be allowed to wave around a paper in
22 front of the jury and say he made \$80 million. So I think the
23 decision is I would -- I would concede they can't talk about
24 those other episodes, but the follow-on is I think they should
25 be precluded, and we plan to move *in limine*, if need be -- or we

1 can have the conversation today -- that they should be prevented
2 from discussing any of the stocks that the SEC were --
3 determined to be meme stocks.

11:48:26 4 Now, I don't have a list in my possession, but what I
5 have is the congressional hearing testimony that I've read
6 through. I've scoured over thousands of pages of congressional
7 testimony and add-ons on this exact issue.

11:48:39 8 **THE COURT:** Okay.

11:48:40 9 **MR. FORD:** And these stock tickers that I'm naming,
10 and I -- I'll say them again, that my client made money on NAKD,
11 that episode that appears in their expert's --

11:48:49 12 **THE COURT:** You may -- spell that.

11:48:51 13 **MR. FORD:** N-A-K-D; Sundial, S-N-D-L; JAGX, J-A-G-X;
14 Express, E-X-P-R; H-O-F-V; Koss, K-O-S-S. I can go down the
15 list of these.

11:49:06 16 These are in the definition of meme stock in Maxine
17 Waters's hearing that she organized before Congress. These are
18 the exact stocks that current acting SEC chair, Gary Gensler,
19 was talking about when he stood in front of Congress.

11:49:21 20 This case -- this is a big case. This is bigger than
21 what the SEC is representing. This is something that has been
22 on the mind of all three branches of the United States
23 government since it happened in January and February of 2021,
24 and nobody could come up with a good excuse as to how it was
25 that we saw so many stocks going to the moon.

1 1 : 4 9 : 4 7 1 **THE COURT:** What other documents, besides the SEC
2 records, do you feel fall under Brady that you don't have?

1 1 : 4 9 : 5 7 3 **MR. FORD:** There's -- there's two other categories.
4 I'm going -- I'll discuss one very briefly, and then I'm going
5 to turn it over to Ms. Solano to discuss the next.

1 1 : 5 0 : 0 5 6 1099-Bs, these are tax summaries that are issued and
7 required to be issued by all broker dealers. They are sent to
8 the IRS. We have, in our possession, tax records from Webull.
9 Now --

1 1 : 5 0 : 2 2 1 0 **THE COURT:** From what?

1 1 : 5 0 : 2 4 1 1 **MR. FORD:** Webull, W-E-B-U-L-L. That's a broker
12 dealer that some of the defendants used. My client primarily
13 used TD Ameritrade.

1 1 : 5 0 : 3 4 1 4 What I have and what I've seen is the same grand --
15 what appears to be the same grand jury subpoena that goes out to
16 Webull and TD Ameritrade, the prosecutors here, in communication
17 with TD Ameritrade, pressuring them to -- to -- you know, to get
18 these documents. We then wind up with the Webull 1099-Bs, but
19 we don't have any from TD Ameritrade, TradeZero, which defendant
20 PJ Matlock primarily used, and several other 1099-Bs.

1 1 : 5 1 : 0 3 2 1 The reason these are so -- these are essential to our
22 defense. I think it is impossible -- impossible for anybody to
23 look at my client's 1099-Bs and believe that, one, he was doing
24 anything wrong, and -- in general, and, two, that he was
25 involved in a conspiracy.

11:51:21 1 What they are is they're concise descriptions of
2 trading activity straight from the source, straight from the
3 broker dealer. What we got in our possession, over a million
4 documents. I believe it represents over 50,000,000 pages, trade
5 records that pour on endlessly. What they did is they gave it
6 to an expert, and they picked and they chose, right, to create
7 this.

11:51:42 8 But what we don't have is the concise end-of-year
9 1099-B tax records. They disprove things so easily, right?
10 During the last hearing, Mr. Armstrong stood up and said, "Look,
11 he said -- on December 13th, he said it was a great stock, and
12 then he sold it." But when you look at the 1099-B, what it
13 reveals is that on the following day, he bought right into that
14 stock, and then he continued to do so over the next few weeks.

11:52:05 15 So we can do that without, one, creating misleading
16 summaries, as the government is doing; two, without requiring
17 the jury to look at literally -- literally tens of millions of
18 trades represented in tens of millions of entries on Excel
19 spreadsheets. I think these 1099-Bs are essential, and what I'd
20 like to be able to do, truthfully, Your Honor, is I'd like to
21 take the other codefendants and line all seven or eight of them
22 up and say, "Look at this. These guys didn't trade together."
23 So that's why I think those are important.

11:52:36 24 The third category Ms. Solano's going to deal with. I
25 think this is very critical to this case, and so I hope you'll

1 also give her some attention to discuss this third category of
2 Brady material. If you have any other questions --

11:52:50 3 **THE COURT:** Yes. Let me ask the defense lawyers
4 present: Is there -- if I were to order 1099-Bs, that would
5 essentially be ordering your tax -- your client's tax
6 records -- or at least this portion of them, to be -- to the
7 codefendants for them to see. Does anyone object to that?

11:53:18 8 Obviously, you could enter a protective order that
9 they not be disclosed outside the confines of the case.

11:53:27 10 **MR. LEWIS:** No objection from Mr. Cooperman,
11 Your Honor.

11:53:29 12 **MR. REYES:** No objection from Matlock, Your Honor.

11:53:31 13 **MR. HILDER:** No objection from Mr. Rybarczyk.

11:53:33 14 **MR. FERTITTA:** No objection from Mr. Deel.

11:53:36 15 **MS. CORDOVA:** No objection from Mr. Hennessey.

11:53:39 16 **MR. MALLETT:** No objection.

11:53:40 17 **THE COURT:** All right. The third category?

11:53:42 18 **MR. ARMSTRONG:** Your Honor, could I address that one?

11:53:43 19 **THE COURT:** Well, I'm going to let you address all
20 three of them in a minute.

11:53:47 21 **MR. ARMSTRONG:** Okay.

11:53:50 22 **THE COURT:** I just wanted to get rid of the -- if
23 we're going to have a privacy issue, I wanted to know before we
24 got down that road.

11:53:59 25 **MS. SOLANO:** Thank you, Your Honor. So the issue that

1 I'm here to address on this point is a disagreement that we have
2 with the government on what would be considered Brady material,
3 and it pertains to two, kind of, buckets.

11:54:09 4 We've got information where the government -- the
5 government's investigative team either did not investigate that
6 one of its own FBI agents had received \$100,000 in trading
7 profits during the time period -- that was obtained during the
8 time period that they've alleged is a conspiracy time period and
9 any investigative efforts to either seek out and have that money
10 returned, or they determined that that money was actually not
11 trading profits, and so they were fine having an FBI agent keep
12 this money even though it was obtained during the time that they
13 have said is an illegal conspiracy involving my client --

11:54:49 14 **THE COURT:** And how do you know about that?

11:54:52 15 **MS. SOLANO:** How do we know about the transfer?

11:54:54 16 **THE COURT:** About the -- an FBI agent that invested
17 and made 100 grand.

11:54:57 18 **MS. SOLANO:** So, Your Honor, in the bank records that
19 were produced in the course of discovery. In the bank records
20 of my client, you can see on the bank records themselves that
21 there's \$100,000 in the name of this FBI agent that goes to the
22 FBI agent, and this FBI agent is the brother-in-law of my
23 client's estranged wife.

11:55:17 24 **THE COURT:** Okay. All right.

11:55:19 25 **MS. SOLANO:** And so the reason why that -- we think

1 that that is exculpatory is what it appears from the
2 government's subsequent filings, ECF No. 346, that they filed on
3 January 31st, it suggests that their financial analyst and the
4 financial agent who has been on this case and is a part of the
5 investigative team missed this -- missed this \$100,000 transfer
6 and didn't know about it or didn't care about it until after it
7 was raised.

11:55:47 8 And the reason why we think that that's so important,
9 Your Honor, is, one, I believe that it is squarely Brady
10 information surrounding either the lack of investigation or that
11 they investigated it, and they determined it didn't matter,
12 because it goes to criticizing the government's investigation,
13 attacking the credibility of the investigation, which under
14 *Kyles v. Whitley* is definitely Brady material. So that is one
15 bucket.

11:56:14 16 And there is also a potential that if there is a
17 reason that they didn't care that this agent had the hundred
18 thousand dollars, if it's because there's an estranged wife
19 situation, I have no idea, but that would be Brady material, and
20 that is the first bucket, that if they have that material, if
21 they have that information, they need to be producing it to us,
22 including the financial disclosure form that this special agent
23 said he disclosed -- he said that he disclosed this \$100,000 on
24 a financial disclosure form with the FBI.

11:56:47 25 It's also important, Your Honor, that any Brady

1 material we get on this -- because the government put in a
2 seizure warrant affidavit, and in that seizure warrant affidavit
3 they made a lot of representations about all of Eddie's money --
4 nearly all of Eddie's money being dirty money, right, which if
5 it's -- if \$100,000 was provided to an FBI agent, and that
6 wasn't disclosed in the seizure warrant affidavit, or it wasn't
7 provided in the analysis, then I think that that is fair game
8 when their testifying witnesses get up on the stand, and we can
9 cross-examine them on that.

11:57:22 10 Now, the agent who's the affiant on those seizure
11 warrants is not on their witness list; however, the financial
12 analyst, who is on their witness list, at least through the
13 course of discovery, it looks like she had a large part in
14 drafting and preparing that affidavit. And if she missed this
15 \$100,000, or if she knew about it and chose not to put it in
16 this paper that went before the Court, I think all of that is
17 fair game to attack the credibility of the investigation.

11:57:51 18 The second bucket, Your Honor, is conversations that
19 one of the prosecutors was having about this case and about my
20 client's assets with his wife's divorce attorney. Now, I don't
21 know what those conversations were because they weren't --

11:58:08 22 **THE COURT:** Let's take that up later.

11:58:11 23 **MS. SOLANO:** Yes, Your Honor. That's all I have.

11:58:14 24 **THE COURT:** Okay. Mr. Armstrong?

11:58:16 25 **MR. ARMSTRONG:** Um --

THE COURT: Or Mr. Carter. Whoever wants to weigh in.

MR. ARMSTRONG: Again, Your Honor, a lot to unpack.

Let's start with just the EXPR and correct the record just a little bit because the facts are important, and there are a lot of things being put before Your Honor that are of questionable source material, to say the least -- to say the absolute least.

Can I have the ELMO, Your Honor?

THE COURT: Yeah. Don't ask me; ask Rhonda.

THE CASE MANAGER: It's not plugged in.

MR. ARMSTRONG: I can still stretch.

Okay. Well, I don't need the ELMO. Your Honor, this is Government Exhibit -- I believe it's 120, and -- may I approach?

(Document handed to the Court.)

MR. ARMSTRONG: Your Honor, this is a government exhibit that's on our witness list, and what this is, this is a direct text message exchange between Mr. Constantinescu, Mr. Hrvatin, and others that are in this room today. And Mr. -- Mr. Constantinescu -- Mr. Constantinescu's attorney expounded at length about EXPR and how Mr. Constantinescu was just trading EXPR like every other stock that he traded.

And so, on January 25th, 2021, he has this exchange about EXPR with Mr. Hrvatin. Mr. Constantinescu starts, at the top of the page: (Reading) I sold EXPR around four, but I regret it. It has more juice, but I didn't buy back. I rarely ever

1 buy back.

12:00:14 2 Mr. Hrvatin's response: (Reading) Samesies. Good
3 shit, dude.

12:00:18 4 Mr. Constantinescu says: (Reading) Why risk it?

12:00:21 5 Mr. Hrvatin says: (Reading) Congrats, Zack. Not
6 worth it.

12:00:26 7 On page 2. Mr. Constantinescu says: (Reading)

8 Thanks, man.

12:00:30 9 Mr. Hrvatin says: (Reading) Why rob the same bank
10 twice?

12:00:34 11 I think that fairly captures what's going on with EXPR
12 and is real-time evidence about the trading strategy that these
13 defendants were executing at the time.

12:00:54 14 So that's just one example just to kind of clear some
15 of the underbrush --

12:00:58 16 **THE COURT:** Let's focus on three categories --
17 actually, four categories because -- the trading records of the
18 codefendants, the SEC records, the 1099s, and the FBI issue.

12:01:20 19 **MR. ARMSTRONG:** Sure. So the EXPR example is the
20 example of one of the meme stocks that Mr. Constantinescu's
21 attorney just referenced. That's why I brought it up, okay?

12:01:29 22 As to the 1099s, that one's the easiest example first.
23 Your Honor, we have produced the trading records and the
24 documents that we have in our possession. The defendants put on
25 their exhibit lists the 1099s that they are seeking a motion to

1 compel about. So, quite frankly, it is lost on me what's going
2 on here with this argument about 1099s.

12:01:49 3 They obviously have them in their possession, and
4 they're on their exhibit lists. So it's mind boggling why we're
5 having this debate about 1099s when they obviously have them,
6 and they plan to introduce them as evidence.

12:02:02 7 **THE COURT:** Okay. The SEC records?

12:02:06 8 **MR. ARMSTRONG:** So the analysis that's being glossed
9 over in the extreme is that we only have in our possession
10 information that is part of the prosecution team.

12:02:16 11 **THE COURT:** No. Wait, wait, wait. Let's go -- back
12 up, though. When you say "we," who is we?

12:02:21 13 **MR. ARMSTRONG:** The prosecution team, the team sitting
14 in this room.

12:02:23 15 **THE COURT:** Okay. It's the United States versus these
16 defendants. If it's in the possession of the United States,
17 it's in your possession.

12:02:34 18 **MR. ARMSTRONG:** So the analysis is that there's the
19 prosecution team, and then there are other federal agencies that
20 may or may not be part of the prosecution team, and that is a
21 very fact-intensive --

12:02:45 22 **THE COURT:** Okay. Well, I'm not recognizing that
23 distinction. I'm telling you right now --

12:02:48 24 **MR. ARMSTRONG:** Okay.

12:02:48 25 **THE COURT:** -- if the United States has exculpatory

1 evidence, it owes that to the defendants.

12:02:55 2 **MR. ARMSTRONG:** So, Your Honor, I understand where
3 you're coming from, but these reports that are being referenced
4 and these reports that are being cited, a lot of them were made
5 before we even had a case that was open, and --

12:03:08 6 **THE COURT:** I understand that, but -- but if -- that's
7 not the issue. The issue is: Is the United States in
8 possession of Brady material? And if it is, it needs to produce
9 it. You can't say, "Well, you know, it's -- I don't have
10 anything in my right pocket because it's all in my left pocket."

12:03:31 11 **MR. ARMSTRONG:** So, Your Honor, I certainly
12 appreciate -- I get what you're saying. We don't have that
13 information in our possession. We would have to go ask the SEC
14 for it, which we don't think we, you know, have an obligation to
15 do unless ordered to do so --

12:03:47 16 **THE COURT:** Okay. Well, I'm ordering you to do so.

12:03:49 17 **MR. ARMSTRONG:** Well, then that --

12:03:50 18 **THE COURT:** Consider that an order.

12:03:51 19 **MR. ARMSTRONG:** Then the devils are in the details on
20 this one because we can't just ask the SEC for documents, you
21 know, that they can't even describe with any certainty in their
22 own pleadings.

12:04:02 23 **THE COURT:** Well, here's the problem, and it's -- I'm
24 not saying you're wrong for doing it, but I'm saying it's partly
25 your making, and this is what I'm hearing today. If you're

1 going to bring in 397 stocks that aren't related to the
2 indictment -- and I'm not saying I -- I'm going to let you do
3 that, but, I mean, I hear you -- that you're trying to do
4 that -- and you can tell me right now you're not, and that's
5 fine.

12:04:38 6 But if you are, they're entitled to say, "Wait a
7 minute. That doesn't have anything to do with the price of tea
8 in China." GameStop, you know, went through the roof because
9 there was this underground movement of "stick it to the man,"
10 and, you know, people all over the United States, you know, got
11 in on it, you know. And if there is an SEC -- if that's part of
12 your case -- and I'm using that one as an example just because I
13 happen to know about that one. You know, it's what I read in
14 the Wall Street Journal. I don't have any personal knowledge,
15 but -- you know, they're entitled to combat that, and if you've
16 got an SEC investigation that says, you know, these defendants
17 didn't have anything to do with GameStop going through the roof,
18 they're entitled to see that.

12:05:37 19 **MR. ARMSTRONG:** Your Honor, I think we have that
20 report. I -- I don't -- sitting here today, I have no idea what
21 the analysis was that --

12:05:44 22 **THE COURT:** Well, and I don't know either, but what I
23 hear is you haven't -- you don't -- you've never seen it. I
24 hear the defendants giving somewhat cogent evidence that it
25 exists. Now, some of it may be speculation. Maybe it doesn't

1 exist. But I'm ordering you to find out if it does, and if it's
2 exculpatory, I'm ordering you to produce it.

12:06:09 3 **MR. ARMSTRONG:** So what are you -- to be on the same
4 page, what are you ordering us to go try to find out?

12:06:14 5 **THE COURT:** Well, if it's -- if it's -- has to do with
6 any of the stocks in the indictment or it has to do with any of
7 these extraneous stocks that you think you're going to offer
8 into evidence.

12:06:28 9 **MR. ARMSTRONG:** But what is Your Honor asking us to
10 actually ask of the SEC? Because I'm going to get this question
11 if I have to ask the SEC.

12:06:35 12 **THE COURT:** Well, I mean, you're going to have to
13 explain Brady to them, to the extent they don't already know
14 what Brady material is, and say that the defendants -- the judge
15 says if there's Brady material inside of this -- your
16 investigation, you have to produce it. And so if there's
17 exculpatory evidence, you know, you're going to have to get it
18 from the SEC and give it to the defendants.

12:07:03 19 **MR. FORD:** Your Honor, if I may interject -- and I
20 apologize for interjection.

12:07:06 21 **THE REPORTER:** I'm sorry. Would you get to a
22 microphone?

12:07:06 23 **MR. FORD:** This -- what we're looking for is all
24 information underlying the SEC's conclusion and analyses in the
25 SEC meme stock report, whether prepared before or after DOJ

1 opened its investigation, including information subpoenaed by
2 the SEC from third parties; all information that contradicts the
3 government's allegations in the indictment or the conclusions of
4 its opinion witnesses related to the 19 stock tickers listed, as
5 well as the 397 episodes relied on for the conspiracy; and all
6 information that would otherwise be exculpatory if contained in
7 the DOJ's own files, e-mails, phones.

12:07:54 8 **THE COURT:** Okay. And what I'm ordering is not as
9 broad as what he just read.

12:07:58 10 Because the first request you had, I didn't hear the
11 word "exculpatory" -- is to the extent there is Brady material,
12 exculpatory material in any of those categories he read, that's
13 what I'm ordering you to produce.

12:08:20 14 Okay. Trading records of codefendants.

12:08:24 15 **MR. ARMSTRONG:** I think that's the 1099 issue, right,
16 Your Honor?

12:08:26 17 **THE COURT:** Okay. Are there -- I didn't understand.
18 Do you have the trading record -- the actual trading records of
19 the codefendants?

12:08:35 20 **MR. ARMSTRONG:** Of course.

12:08:36 21 **THE COURT:** And have they been produced?

12:08:37 22 **MR. ARMSTRONG:** Of course.

12:08:38 23 **THE COURT:** Okay. All right.

12:08:44 24 **MR. ARMSTRONG:** And then the third issue, I believe,
25 is the Agent Applegate issue. Is that right, Your Honor?

12:08:51 1 **THE COURT:** Yes.

12:08:51 2 **MR. ARMSTRONG:** So for this one, I think that the
3 facts are important. Agent Applegate is an agent out of the
4 Texas Bryan station, not the Houston field office where
5 Agent Hale and Agent Dillon work. And Agent Hale and
6 Agent Dillon were the two FBI agents who were the co-leads -- or
7 Agent Dillon was a secondary on this case.

12:09:20 8 Agent Applegate works primarily on national security
9 issues, and what Agent Hale did was he actually affirmatively
10 put this case in protective status in the FBI's own files. And
11 so what that means is that the file itself was not even viewable
12 to Agent Applegate, and he was not even aware of the
13 investigation into Mr. Constantinescu until, I believe, the day
14 before the arrest when he was given a courtesy that the husband
15 of his sister was going to be arrested.

12:09:56 16 So the suggestion that Agent Applegate was involved in
17 this case is just not true because we took affirmative steps to
18 wall him off. And so, therefore, what is the analysis under the
19 law? Is the fact that he got \$100,000 Giglio information? No,
20 because he's not a testifying witness in this case. Is it
21 Brady? I think it really strains the concept of Brady to say
22 that his receipt of \$100,000 is somehow Brady information
23 because it doesn't show that Mr. Constantinescu did or did not
24 actually commit the offenses in this case.

12:10:34 25 It could potentially -- and I think there would be a

1 motion in limine on this. It could potentially be used as
2 cross-examination as to other witnesses about their knowledge
3 about whether this fact did or did not happen, but I think
4 that's the extent of that information. I think that the rabbit
5 hole gets run down pretty quickly thinking about other
6 possibilities to shoehorn the fact of this transfer into
7 actually legal cognizable claims.

12:11:02 8 **THE COURT:** Okay. Here's what I want to do: As I
9 said, I'm granting the motion as to the SEC records. I would
10 grant -- or I am granting the motion as to the trading records
11 in the 1099-Bs. I understand, Counsel, that you're telling me
12 that those have already been produced. So that's not a problem,
13 but if they -- if they haven't been, I'm ordering you to produce
14 them.

12:11:33 15 And it might make things go quicker if you could, you
16 know -- if you have Bates numbers or whatever or tell them what
17 part of the production those are on.

12:11:42 18 **MR. ARMSTRONG:** Your Honor, just to be clear, I -- I'm
19 concerned that we're talking past each other just a little bit
20 on the trading records point.

12:11:49 21 **THE COURT:** Go ahead.

12:11:50 22 **MR. ARMSTRONG:** We do not have the 1099s in our
23 possession. The defendants have the 1099s in their possession.
24 We have produced, in this case, our -- like, the bank
25 statements, the trading statements, and the trading blotters,

1 every trading document --

12:12:02 2 **THE COURT:** Okay. But you -- but you don't have the
3 1099s?

12:12:04 4 **MR. ARMSTRONG:** Exactly.

12:12:05 5 **THE COURT:** Okay. Well, y'all can get them from each
6 other.

12:12:09 7 **MR. ARMSTRONG:** They're on their exhibit lists.

12:12:11 8 **THE COURT:** So I would strongly suggest that
9 defendants -- but the trading records -- and if you don't have
10 the 1099s, I think just a response in writing that, "We don't
11 have those," suffices.

12:12:25 12 **MR. ARMSTRONG:** Certainly.

12:12:27 13 **MS. CORDOVA:** Your Honor, if I may just speak on the
14 1099s. I'm not sure that we do have all of the 1099s even from
15 our --

12:12:33 16 **THE COURT:** Well, he's saying he doesn't have them.

12:12:34 17 **MR. CORDOVA:** But the U.S. government does have them.
18 They all have to be filed with the IRS. So he has access to
19 them within the U.S. government.

12:12:41 20 We are not in a position, as far as I can tell --
21 we've looked into this -- to be able to actually go back to the
22 years where those 1099s existed for all of the accounts and
23 collect them ourselves and provide them to defense -- other
24 codefendants' counsel.

12:12:56 25 **THE COURT:** So you can't get your own 1099s?

12:12:59 1 **MS. CORDOVA:** Not that we're aware of. The government
2 has them. They're in the government's possession.

12:13:03 3 **THE COURT:** Well, yeah, but the IRS and the
4 government...

12:13:13 5 **MR. LEWIS:** Your Honor, on that point, some of us do
6 have -- for instance, Mr. Cooperman, Webull is the broker trader
7 he used. They did provide -- he has them. Many of them, the
8 defendants, such as Mr. Constantinescu with Ameritrade, do not
9 have them.

12:13:26 10 **THE COURT:** Can -- what's the -- will -- for instance,
11 will the brokerage house have them? Will Ameritrade have them?

12:13:33 12 **MR. FORD:** That's what I'm proposing. They are on our
13 exhibit list, but we were going to have to Rule 17 them. To
14 obtain everybody's, we would have to go to, you know -- I mean,
15 these guys used multiple broker dealers. So the idea was we
16 were -- we put them on the exhibit list with the intent of
17 filing multiple Rule 17 subpoenas to obtain them from the broker
18 dealers.

12:13:53 19 **THE COURT:** Well, why don't you provide me --
20 obviously, copying Mr. Armstrong with it -- a subpoena or a
21 draft of what you would like, and -- and we'll -- that way
22 everybody will have them, and, you know -- now, they may not
23 turn out to be exculpatory. They may turn out to be
24 inculpatory, but -- and I think that's the best way to handle
25 that because, otherwise, I mean, you know, what do -- the IRS,

1 what, two weeks ago said they lost, like, 20 billion tax returns
2 or something. I mean, getting it from the IRS may -- may be
3 problematic. So let's try it that way. Prepare a subpoena, and
4 the Court will sign that.

12:14:42 5 All right.

12:14:45 6 **MR. ROSEN:** Your Honor, just to briefly address, while
7 we're here: I know the SEC records have been ordered. We'd ask
8 that the FINRA, a quasi-government agency under the supervision
9 of the SEC, also be ordered to produce those same records. The
10 lead government expert, Peter Melley, is a FINRA employee.
11 We've gotten some FINRA productions; we haven't gotten a lot.
12 Extraordinarily important.

12:15:06 13 FINRA, when they investigate manipulation or things,
14 they produce a report that often gets sent to the SEC that
15 sometimes travels over to the DOJ, depending on whether criminal
16 involvement.

12:15:18 17 We got one report, stock UUU. I don't think that's
18 charged here or even in the 397-odd stocks. My client's listed
19 in that as potentially involved, but then they talk about
20 insiders doing actually -- the actual manipulation like a
21 traditional pump-and-dump -- this guy, Mr. Alt (phonetic), who
22 was actually recently charged by the SEC.

12:15:37 23 So I do ask at least for the 397, as well as for what
24 Mr. Ford raised, that FINRA be ordered to produce that as well.

12:15:44 25 **THE COURT:** Okay. I'll include that in my order.

12:15:50 1 All right. Does -- I think that resolves those
2 issues, Mr. Armstrong.

12:15:57 3 Now, does anybody else have a -- an issue that
4 involves discovery that we haven't covered?

12:16:05 5 **MS. SOLANO:** Your Honor, I'm sorry. I just didn't
6 hear what Your Honor's ruling is on the -- the exculpatory data
7 involving the testifying agent's potentially missing the
8 \$100,000 --

12:16:15 9 **THE COURT:** I'm going to actually take that up
10 separately.

12:16:18 11 **MS. SOLANO:** Thank you, Your Honor.

12:16:20 12 **MR. ROSEN:** There's one other issue that just relates
13 to us. We've gotten E-Trade records from -- from the
14 government. It's a little bit weird because they only go back a
15 year, actually, the paper copies; the statements. We have these
16 massive spreadsheets that are the trade -- the actual trades.
17 There's, like -- they're, like, 25 megabytes each. They're
18 enormous.

12:16:41 19 And so just a little odd that we haven't gotten the
20 actual paper statements. I just ask for the government to go
21 back and just make sure those weren't produced by E-Trade
22 because, usually, they give you -- if you do a subpoena to them,
23 they give you a couple years' worth of trading data. We've only
24 gotten the one year. So I just wanted to raise that issue.

12:16:56 25 **THE COURT:** Would you just check and see if you have

1 the paper?

12:16:59 2 **MR. ARMSTRONG:** Of course.

12:16:59 3 **THE COURT:** All right.

12:17:00 4 **MS. CORDOVA:** Your Honor, we also have a motion to
5 compel a -- witness statements, and the issue is that the
6 government has taken a categorical approach to saying they will
7 not produce any testifying witness's e-mail that discusses the
8 search warrant, seizure warrant, any -- any affidavits or expert
9 reports except for the final signed magistrate judge-approved
10 version or in the expert report -- expert-signed version.

12:17:29 11 Now, that's an extraordinary position, in my
12 experience, for the government to take. We're not saying that
13 every e-mail sent between the testifying agent or an expert and
14 the prosecution is a Jenks-qualified witness statement, but to
15 take a categorical approach that, "We will not be producing any
16 of these materials," is inappropriate and contrary to the law.

12:17:53 17 And, therefore, we've asked for *in camera* review of
18 those materials so that Your Honor can determine which documents
19 are, in fact, witness statements that should be produced.

12:18:02 20 **THE COURT:** Okay. Let me take that up with the FBI
21 issue.

12:18:11 22 All right. I tell you what, why don't we take a 10-
23 or 15-minute stretch break. Come back at 12:30, and I'm going
24 to go through these motions.

12:18:22 25 *(Recess taken from 12:18 p.m. to 12:36 p.m.)*

12:36:15 1 **THE COURT:** All right. Be seated.

12:36:21 2 Okay. All right. By my count, we have addressed the
3 Brady motions with one exception. I haven't ruled yet on the
4 trial setting, but we do have some individual motions from
5 various -- Mr. Rybarczyk has filed an opposed motion to exclude
6 the 397 episodes, which the government has not had time to
7 respond to. So I'm going to let the government respond to that.

12:37:22 8 He's also filed, if I'm finding it in the right place,
9 a joint motion to dismiss, which is -- again, the government has
10 not had time to respond to that. So I'm going to let the
11 government respond to that, although I -- I would point out, I
12 mean, basically, it's based on both the Fifth Circuit law and
13 the Supreme Court law that holds you've got to have an actual
14 loss of property, that losing something intangible is not
15 subject to a fraud claim.

12:39:13 16 I will say that both the Supreme Court case, which
17 Justice Thomas wrote, and the leading Fifth Circuit case, which
18 I think Judge Stewart wrote, if I'm right and my memory serves
19 me here -- yeah -- both indicate that if you are deceiving
20 others to obtain something of value, that's also actionable.
21 And so I'm going to wait and rule on those when the government
22 responds.

12:39:52 23 Mr. Armstrong, is ten days enough to respond to those
24 two motions?

12:39:58 25 **MR. ARMSTRONG:** The extraneous 397 and the motion to

1 dismiss?

12:40:02 2 **THE COURT:** Yeah.

12:40:02 3 **MR. ARMSTRONG:** Yeah. Of course.

12:40:03 4 **THE COURT:** Okay. All right. So you have ten days to
5 respond to that.

12:40:11 6 I have a -- a motion that is still showing as pending,
7 which was Mr. Hennessey's first motion to dismiss, and I'm
8 denying that.

12:40:30 9 And I guess, Ms. Cordova, is there a second set of
10 motions -- there's the -- was the first one. Is that -- and
11 then there's one that addressed counts 8, 9, and 11?

12:40:48 12 **MS. CORDOVA:** That was the first one. The 8, 9, and
13 11 motion to dismiss was the first motion.

12:40:53 14 **THE COURT:** All right. That's -- I'm denying that
15 one. And is there a second one?

12:40:56 16 **MS. CORDOVA:** We filed that with the other motions to
17 dismiss. So there was the 8, 9, and 11, which we filed first
18 right after the superseding indictment came out. Then we filed
19 our big motion to dismiss later.

12:41:05 20 **THE COURT:** Okay. So I'm denying the 8, 9, and 11
21 motion to dismiss.

12:41:13 22 I'm trying to look and see what other issues we've got
23 pending.

12:41:30 24 I think I've covered everything until we get to the
25 motion for continuance, and I'm -- I'm denying the motion --

1 Mr. Hennessey's motion to sever. I'm granting the alternative
2 plea in that motion to sever as well as the other motions for
3 continuance.

12:41:50 4 And while I know, Ms. Cordova, your client would have
5 preferred to go to trial six weeks ago -- six months ago,
6 maybe -- and so I probably know your answer, I'm -- there are
7 two -- I have two windows to try this, and -- and I have,
8 basically, February and April. And I want some feedback from
9 y'all, and I know, you know, everybody's going to have
10 scheduling, but we're just going to have to declare one of them.

12:42:37 11 But part of the issue in this is how long this trial's
12 going to take. And since we're all here, I want to talk about
13 that because, you know, I've looked at the witness designations
14 and some people have designated 40 or 50 witnesses; 10,000
15 exhibits. I mean, what are we realistically talking about?

12:43:03 16 And I understand that sometimes you designate
17 individuals in kind of a CYA fashion, "In case, you know, the
18 sun rises in the west, I may have to put this person on." But
19 realistically -- and, Mr. Armstrong, let me -- let me start with
20 you.

12:43:23 21 I mean -- and keep in mind that my number one
22 concern -- obviously, I want y'all to get a fair trial. That's
23 number one, but I also -- 1A is we're going to have to pick a
24 jury, and we're going to have that jury, you know, go
25 through all this and listen to all this, and I don't -- I keep

1 looking at this, and I can't see -- I understand the issues with
2 discovery, but I can't see why we're going to have big issues in
3 trying the case.

12:44:06 4 And maybe it's just me, and maybe it's the way I used
5 to try cases and I'm imputing that to y'all, but, I mean, none
6 of these -- no juror's going to look at 10,000 exhibits from one
7 party in a -- in an eight-party case. I mean, what's --
8 realistically is going to happen is the government's going to
9 put on its case, and each defendant is going to say -- and part
10 of the case, I would imagine, would be cross-examination by the
11 defendant saying, "Well, I see where you picked this one, and
12 you picked this one, but you left out, you know, all these
13 communications between them, and, oh, by the way, they -- they
14 declared a stock dividend in the middle of this, and their stock
15 went through the roof because of this dividend."

12:45:00 16 I mean, I can see all that, but I can't see this case
17 being drug out -- somebody mentioned the *Enron* case, which, of
18 course, is a four-letter word here, not a five. But I can't see
19 why it would be tried that way.

12:45:21 20 I mean, to me, it would be short, sweet. Here's the
21 deal from the government's standpoint.

12:45:27 22 And from y'all, from the defense standpoint, it would
23 be, you know, this would be -- the government would be right if
24 this is all you looked at, but what about all this, you know.
25 They didn't count A. They didn't count B. They didn't count C,

1 you know.

12:45:43 2 You know, they omitted two hours' worth of trades or
3 two hours' worth of back and forth. I mean, realistically --
4 and, Mr. Armstrong, we'll start with you. I mean, how long do
5 you think the government's going to take to put on its case?

12:46:06 6 **MR. ARMSTRONG:** If we're talking purely about question
7 and answer, question and answer from the United States?

12:46:11 8 **THE COURT:** Yeah.

12:46:12 9 **MR. ARMSTRONG:** Two weeks.

12:46:14 10 **THE COURT:** Why is it going to take that long? And I
11 realize we have seven defendants. So, I mean, I realize that.

12:46:20 12 **MR. ARMSTRONG:** So just running through --

12:46:22 13 **THE COURT:** A lot of the defendants are cross- -- I
14 mean, they're cross charged.

12:46:26 15 **MR. ARMSTRONG:** So just running through the witness
16 list in my head, we would have the data expert, for lack of a
17 better word, Ms. Garibotti. She would talk about the process
18 that went into making the charts, which are compelling evidence
19 in this case. That would probably be three-quarters of a day to
20 a day.

12:46:44 21 Then we would have two cooperators in this case,
22 probably a day for each, just question and answer, question and
23 answer. Then we would have a whistleblower in this case, half a
24 day. The case agent, half a day.

12:46:59 25 Then we would have the victims in this case to prove

1 up the materiality point. There are a lot of substantive counts
2 that are charged, and so we have in the ballpark neighborhood of
3 10 to 15, I believe, victims, but those are fast witnesses. I
4 think that --

12:47:16 5 **THE COURT:** And what are they going to testify, that
6 "I looked at this Twitter feed, thought it was a great stock,
7 and I bought it, and I lost my shirt because I listened to the
8 Twitter feed"? I mean, what are the -- kind of tell me what a
9 victim's going to say.

12:47:33 10 **MR. ARMSTRONG:** Sure. So they'll say -- all the
11 stories are different, of course, depending on who followed whom
12 at what point. But in the main, they would say, "I followed
13 defendant A on Twitter. I trusted him. I believed that he knew
14 what he was doing. If I had known that he was selling at the
15 same time he was telling the world to buy or to hold, that would
16 have been important to my decision to buy the stock in the first
17 place. And so because I was deceived, because I was misled by
18 the defendant's statements, I was, therefore, harmed."

12:48:05 19 **THE COURT:** Okay. And how do you see these 397
20 uncharged episodes coming in?

12:48:14 21 **MR. ARMSTRONG:** So as we said in -- at this point, I
22 forgot which response it was. There's no universe in which
23 we're going into 397 at all. I thought that we tried to narrow
24 the issues a little bit and represent to the defendants that we
25 would seek to offer affirmative evidence as to the first 45

1 episodes that are GX1 through 45 with some sub exhibits.

12 : 48 : 40 2 So that would be the -- in the main, the universe that
3 we'd offer at trial, and then we'd have to go back -- and I
4 thought about doing this last night, go back and see which other
5 episodes we would add to the actual trial presentation. I think
6 that there are a few, off the top of my head, that match up text
7 messages that are otherwise exhibits. And so we'd probably
8 include those, as well, as part of the trial presentation, but
9 there's no universe in which we're going over 100, 200, or even
10 300.

12 : 49 : 10 11 The point of those is just to explain the methodology
12 that fed into Ms. Garibotti's ultimate profit amount.

12 : 49 : 22 13 **THE COURT:** And why does that matter?

12 : 49 : 26 14 **MR. ARMSTRONG:** Why does what matter, Your Honor?

12 : 49 : 28 15 **THE COURT:** How much money they made. I mean, if they
16 committed fraud, they're guilty. If they didn't commit fraud,
17 they're not guilty. And whether it's fraud for \$10 or fraud for
18 100,000,000, what difference does it make to the jury?

12 : 49 : 44 19 **MR. ARMSTRONG:** I think it goes squarely to motive, to
20 explain why they were doing this, and it goes to their intent,
21 because it was extremely profitable to trade in this manner and
22 hold themselves out as A, when, in fact, they were doing B. And
23 so it explains why they had skin in the game to act in the way
24 that they did.

12 : 50 : 04 25 **THE COURT:** All right. Well, I'm going to let you

1 respond to the motion that Rybarczyk filed to exclude those, but
2 I'm telling you right now I'm thinking that's a hard row for you
3 to hoe. I mean, I'm not seeing that, especially from a legal
4 standpoint, but I'm also seeing it from a practical standpoint.

12:50:26 5 I mean, the minute you introduce that, I'm going to
6 get one of the defense lawyers to stand up and say, "Well, let's
7 go through the facts of that one," and -- and we're trying an
8 uncharged case by that point. And -- and so keep in mind you're
9 going to need to do some convincing when you reply to that
10 motion.

12:50:56 11 **MR. ARMSTRONG:** So I totally hear Your Honor on the
12 practical standpoint. Again, just to underscore, we're not
13 getting into anywhere close to the 397. I think the
14 three -- the 1 through 45 we are absolutely going to do because
15 a lot of those have contemporaneous text messages and otherwise
16 direct messages between the defendants and show the concert of
17 action and show the conspiracy in action, show them coordinating
18 behind the scenes to do exactly what we are --

12:51:23 19 **THE COURT:** Well, of course -- and I haven't seen it.
20 So I don't know what they show, but, I mean, that's the kind of
21 thing you're going to have to tell me about, why that would be
22 relevant.

12:51:31 23 **MR. ARMSTRONG:** Certainly.

12:51:32 24 **THE COURT:** All right.

12:51:38 25 Who wants to lead off, talk to me about -- the defense

1 lawyers, what do you -- thinking time-wise? I mean, the way I'm
2 looking at this is we've got to try this in a month. I mean,
3 we'll be lucky to have a jury for that long.

12:51:55 4 **MR. FORD:** I tend to agree with you on that, but I
5 think the issues --

12:51:58 6 **THE REPORTER:** I'm sorry. Microphone.

12:52:02 7 **THE COURT:** It's -- yeah, get near a microphone.

12:52:04 8 **MR. FORD:** I tend to agree. We would -- we prefer to
9 move as quickly as possible to keep the jury's attention. The
10 issue, as we see it from the defense perspective, is the way the
11 government is choosing to prosecute this case. All of their
12 exhibits are not actual evidence, but summary charts, and
13 they're going to attempt to try this case through experts,
14 specifically people with relationships to the Securities and
15 Exchange Commission, FINRA. And they're going to bring them in,
16 and they're going to have experts who are going to say, "Hey,
17 look at these summary charts we made. These guys committed
18 fraud."

12:52:37 19 The defense to that is going to be to have to unpack
20 it, and I think that -- and I'm not joking. I think two years
21 would be a conservative estimate for trying to unpack what the
22 government is attempting to prove. As Mr. Rosen, my colleague,
23 said, who also has a lot of experience with this, with a case
24 where there's been charged two, three, four pump-and-dumps,
25 we're oftentimes looking at a several-month-long trial, maybe

1 two months, three months.

12:53:03 2 So I think the nature in which the government is doing
3 it is one issue. The other really very big issue is this
4 causation thing. The government has got to take an affirmative
5 stance on whether they're arguing causation. They either are or
6 they aren't.

12:53:21 7 If they're not going to argue causation, I tend to
8 agree with Your Honor. I think we could potentially do this in
9 a month, but if they're going to argue causation, we need to be
10 presented the opportunity to come in and say, no, the price
11 fluctuations, the price movements, these guys had nothing to do
12 with that. There were other factors and variables that caused
13 it, in which case, again, now we're talking about a multi-month
14 endeavor.

12:53:44 15 As far as February or April, our vote would be for
16 April. Our team -- and I understand all the other teams are
17 prioritizing this case. We understand the significance
18 of -- and importance. We're not going to be able to coordinate
19 the scheduling of 20, 25 attorneys. So I think, when we walk
20 away, if we say April, we're all going to clear it and be ready
21 to do it.

12:54:04 22 But that's our position as far as why it's taking so
23 long. I think -- I do think a month is a conservative estimate
24 if they're going to push on the causation and their case is
25 primarily going to be built around having SEC and FINRA experts

1 testify about charts that they made. That's going to take an
2 awful lot of time for each of the codefendants' attorneys to
3 unpack.

12:54:25 4 **THE COURT:** Let me -- let me mention one thing about
5 that, and it's kind of a little off track from what you just
6 said, but there was one motion -- or notice, I think, that
7 basically said, All right, government, I'm going to make you
8 authenticate everything, and here's -- here's what I -- I don't
9 want to have happen -- and, I mean, if there is some real
10 question about whether a summary is an actual summary, I mean,
11 obviously, that's fair game.

12:54:59 12 But I don't want to have to have a business records
13 person get up here and answer the -- you know, take an hour of
14 testimony just to say these are business records. I don't want
15 to have to go through with a witness and say, "Okay. Where is
16 this in the file," when everybody knows it's in the file.

12:55:29 17 Now, having said that, as I said a minute ago, I think
18 it's fair game to say, "Fine. You picked this from
19 September 3rd and this from September 5th, but look at what
20 happened on September 4th." That's clearly fair game and -- and
21 good cross-examination, but -- but I don't want to get this
22 trial tied down, when we have important merits to talk about, on
23 something that -- that, quite frankly, y'all should be able to
24 agree on, you know, like, okay, here are the TD -- what is TD
25 trading called? I can't even remember anymore.

12:56:13 1 **MR. FORD:** TD Ameritrade.

12:56:15 2 **THE COURT:** TD Ameritrade.

12:56:16 3 I mean, these are their records. Okay. We don't have
4 to have somebody from them come down here and say, "Was this
5 kept in the regular course of business? Was it made be somebody
6 at the time?" You know, all that kind of stuff, I don't want to
7 do that because this trial's going to be long anyway.

12:56:32 8 I'm probably going to -- I haven't thought about how
9 I'd do it, although I was getting ready to given the October
10 trial setting. I'm probably going to do a timing order on
11 everybody. And in that regard, with regard to the defendants --
12 and it's -- I don't think it's necessarily unfair, but if
13 somebody's already plowed a row, I don't want somebody to come
14 back and plow that same row, you know.

12:56:59 15 I mean, sometimes the best cross-examination is to
16 stand up and say, you know, "Did you see my client's name
17 anywhere on that?"

12:57:07 18 "No."

12:57:08 19 "Thank you." Sit down, I mean, you know, and let the
20 people that have the dog in the fight on Count 2 or Count 3
21 make -- you know, fight that fight. They won't need everybody
22 else to help fight it.

12:57:26 23 And what I'm -- I mean, since I am going to grant a
24 continuance, I'm -- I'm just fleshing this out for y'all because
25 I want y'all to really take into consideration how we're going

1 to present this because it's going to take a lot of work.

12:57:43 2 One thing I think y'all should consider -- and I'm not
3 ordering it, but I would think quite helpful, because I'm going
4 to do the voir dire, that y'all might want to get together and
5 do a joint jury questionnaire. And what we'll do, and what
6 we've done in the past, is we bring the jury in, let's say, on
7 Thursday or Friday, have them answer the questionnaire, and
8 Rhonda speedily copies the answers for everybody and gets them
9 out to you so you have two or three days to look at it before we
10 actually get the jury in here. I mean, you know, it's -- that's
11 a lot -- in my experience, that's a lot better than saying,
12 okay, here's the answer to the questionnaire, now start
13 questioning, you know. You know, so you'll have a time to look
14 at it; time to do it.

12:58:40 15 What I normally do is I will do the voir dire
16 generally, but then if there are any individual jurors that
17 people have questions about, we'll bring them in privately
18 outside the presence of the other jurors, and that way we won't
19 taint the panel if we're -- you know, somebody gets up and says,
20 you know, "I hate the government," you know, "I grew up on Ruby
21 Ridge, and then I moved to Waco for the" -- for that episode.
22 And so, you know -- but -- but so I want to -- I want y'all to
23 be thinking about how we're going to do this.

12:59:31 24 I mean, I'm -- quite frankly, I'll tell you right now,
25 I'm worried about where we're going to do it because I'm not

1 sure this courtroom is big enough. So I may be negotiating with
2 Judge Hoyt or Judge Rosenthal to use one of the bigger
3 courtrooms to do this.

12 : 59 : 50 4 But I -- what I really want is a crisp presentation
5 where -- it's been my experience, and I've had several long
6 trials, that, you know, most of the prospective jurors are going
7 to do their best to get out of jury duty, but once they're
8 picked, they do their best to do their civic duty. And once
9 they're on the jury, they're going to do the right thing, but
10 they hate it when lawyers waste their time.

13 : 00 : 25 11 I mean, you know, they hate it when they're
12 unprepared. They hate it when they're just asking the same
13 question over and over again, and, quite frankly, usually they
14 penalize that lawyer's client eventually. So I want y'all to
15 keep in mind -- and I'm giving you now three or four months to
16 consider how are we going to present this case in a concise
17 manner.

13 : 00 : 51 18 Obviously, you want to protect your clients.
19 Obviously, the government's trying to get a conviction, and
20 that's fine to represent your sides of the "V." That's
21 expected. But, you know, how do you make it short and sweet and
22 impactful for your side where the jury is not just beat up for a
23 month?

13 : 01 : 15 24 Anyway -- all right. I'm -- I'm going to designate
25 April as the month.

13:01:19 1 Go ahead. You want to weigh in?

13:01:23 2 **MR. WILLIAMS:** Judge, I had a suggestion. Some of the
3 things -- I think you may have our office bugged because some of
4 the things you mentioned are things that we've actually talked
5 about. Joint questionnaire, I don't think anybody in this
6 room's going to disagree with that. We can come up with one we
7 could present to the government. In my experience, they help
8 both parties exercise their peremptories and, to some extent,
9 their challenges for cause.

13:01:43 10 I agree I think we should explore -- having tried,
11 with Laura, years -- almost ten years ago, an almost-as-large
12 case in Judge Gilmore's courtroom that took, I think, the first
13 six or seven weeks of my youngest child's life, literally.
14 Like, she was born; we got a week continuance for that; and then
15 we started trial. My wife still hates me over it.

13:02:04 16 I think it's challenging to do it on the ninth floor.
17 I think the 11th, if we could somehow orchestrate that, would be
18 great. I think that we should have a robust pretrial hearing
19 around the Ides of March, not so we can stab each other like the
20 Roman Senate, but so that we can hash out some of these issues
21 over summary charts.

13:02:24 22 I agree 902(11), 803(6), business records issues, I'm
23 not here to deal with that. That's -- that's beneath everybody
24 in this room. I think the Fifth Circuit precedent is so
25 flexible in that regard, we don't need to waste time with that,

1 but there may be very real questions that, if we address
2 sufficiently in advance of an April setting, may streamline the
3 process.

13:02:47 4 But the number one consideration that I would express
5 is that the length of the trial -- and Your Honor has the
6 procedures and the right, under Rule 611 of the federal rules,
7 to address the presentation and the mode of questioning to avoid
8 the waste of time or pettiness and that sort of thing. I think
9 that's actually in my motion.

13:03:09 10 But the length of this trial is going to be directly
11 proportional to the number of stocks the government presents
12 evidence on. So that's -- that's the elephant in the room. If
13 it's the 19 stocks in the indictment, then it's a short trial
14 because I'm not going to be asking questions about 19 stocks,
15 because Mr. Rybarczyk isn't affected by 19 stocks. So I may not
16 have questions or my colleagues on our team may not have
17 questions of a bunch of the witnesses because they're not about
18 Mr. Rybarczyk.

13:03:40 19 So, for me, that's really a handful of stocks. So 19
20 in the aggregate, a few per defendant, is -- will dictate the
21 length of the trial because there's no need for seven defense
22 lawyers to question a witness who doesn't lay a hand or doesn't
23 express anything about their client, and Your Honor doesn't have
24 to worry about extraneous information of another, call it 26
25 of -- of they say 45. Gee, thanks. There's only 19 in the

1 indictment -- of an additional 26 tickers, let alone another
2 350-odd.

13:04:18 3 So if we can do this trial from around Tax Day to when
4 I usually go on vacation in June, because I'm selfish, the -- I
5 think we can do that --

13:04:30 6 **THE COURT:** Notice how he went from a month to
7 six weeks? He just slid right into that.

13:04:38 8 **MR. WILLIAMS:** Look, if we could do it between April
9 and Memorial Day, I think, with the 19 -- because there are
10 seven defendants, Your Honor. And I could tell you, oh, we
11 could do it in X, but I've known how long I've taken to
12 cross-examine an important witness, and not to waste time, but
13 just to do it thoroughly and effectively, and I -- Mr. Lewis
14 doesn't appear to be here, but I've seen him in action. I've
15 tried cases with Laura.

13:05:01 16 I've seen at least half of the lawyers in this room in
17 action. I have a lot of respect for them, and I don't think any
18 of them usually wastes anybody's time in their questioning.

13:05:09 19 So the -- but, again, it's going to be tied to how
20 many stocks are we dealing with. The government has 19 chances
21 to prove a conspiracy in a fraud. If they can't get it done
22 with 19, 45 is -- I mean, it's just piling on. It's there, and
23 as Your Honor pointed out -- and it's in our motion, and I know
24 they'll have time to respond to it -- loss is an issue for the
25 Court to consider, as is restitution post conviction.

13:05:38 1 So if we can deal with motions *in limine*, like I said,
2 sometime in March because, based on those rulings, people may
3 need to amend their exhibit lists, tailor their
4 cross-examinations, and if we do that the day before voir dire,
5 it doesn't really help people. If we do it a month out, then it
6 may actually help streamline the case.

13:06:00 7 So those are my suggestions and my observation, that
8 it's just going to be tied to how many stocks are at issue,
9 although I know the government needs time to weigh in on my
10 motion, as do others.

13:06:09 11 **THE COURT:** Okay. All right.

13:06:12 12 **MR. ARMSTRONG:** Your Honor, if I may?

13:06:13 13 **THE COURT:** Yeah. Go ahead.

13:06:14 14 **MR. ARMSTRONG:** So I hear Your Honor on scheduling for
15 next year. My only concern is that, given Your Honor's order
16 about both FINRA and the SEC, we are, to some extent, beholden
17 to bureaucracies --

13:06:34 18 **THE COURT:** And you may need to report back to me --

13:06:36 19 **MR. ARMSTRONG:** Yeah.

13:06:36 20 **THE COURT:** -- and say, "Judge, this is a bigger deal
21 than you thought it was."

13:06:41 22 **MR. ARMSTRONG:** I can guarantee you that's going to be
23 the case, Your Honor, because I've dealt with these
24 bureaucracies before, and it's nearly impossible, and things
25 that you think could take a week take 12 weeks just on the most

1 basic, fundamental issues.

13 : 06 : 53 2 **THE COURT:** Well, and we may have to change. We may
3 have to -- we may have to move. April may not work, but I'm
4 hoping it will. I'm trying to be realistic, which is why I
5 didn't take February.

13 : 07 : 04 6 **MR. ARMSTRONG:** So I -- I have one suggestion for
7 Your Honor. I think Your Honor -- I may stand corrected. I
8 think Your Honor said that we need to make the request to the
9 SEC and FINRA as to all 397. Did I hear you right?

13 : 07 : 18 10 So if Your Honor is inclined to limit our proof at
11 trial to a more discrete set of episodes, I think that would go
12 a long way in, fingers crossed, helping speed along our request
13 to --

13 : 07 : 36 14 **THE COURT:** Well, I'm not sure --

13 : 07 : 37 15 **MR. ARMSTRONG:** -- either of these agencies.

13 : 07 : 38 16 **THE COURT:** I'm not sure that I'm in a position to do
17 that. You're actually in the better position. If you want
18 to -- if you want to limit it to the 45 that you've already
19 figured out that these are the most relevant, but the -- the key
20 here, though, is that if -- if it's exculpatory, they get it.

13 : 08 : 02 21 **MR. ARMSTRONG:** Understood. I --

13 : 08 : 04 22 **THE COURT:** I don't want to try this twice. It's
23 going to be hard enough to try once.

13 : 08 : 08 24 **MR. ARMSTRONG:** Yeah. And I understand Your Honor's
25 ruling, and I'm not going to quibble with it. So we'll do our

1 darndest, of course.

13:08:21 2 **THE COURT:** Okay. Let me -- I want to visit with
3 Mr. Constantinescu's lawyers and the government over that third
4 motion and the FBI issue because I -- it's -- it's his
5 brother-in-law, right, that's the FBI agent?

13:08:50 6 **MS. SOLANO:** (Nods head.)

13:08:53 7 **THE COURT:** Let me see y'all up here.

13:09:05 8 *(Discussion at bench as follows with Mr. Armstrong,
9 Ms. Solano, and Mr. Ford.)*

13:09:16 10 **THE COURT:** Not on the FBI issue, but on the
11 conversations with the lawyer issue, I've seen some of those
12 communications. So far -- and I don't know how much of it I've
13 seen. I don't think there's anything exculpatory in there. In
14 fact, it's inculpatory.

13:09:41 15 I mean, there's -- and maybe we want to talk this --
16 just go -- I don't know how much of it you gave me or how much
17 you have other stuff. I mean, it -- just to be blunt, the
18 government made -- made a motion to -- for me to, basically,
19 take him into custody based on some of the comments he made,
20 which I obviously didn't grant.

13:10:11 21 But there is -- I mean, there's some testimony on --
22 evidence -- "testimony," obviously, that -- that is not very
23 flattering in that third motion. Now, I don't -- we can discuss
24 it in open court; we can go into chambers and talk about it.
25 You know what I'm talking about, I guess -- or maybe Mr. Carter

1 does.

13 : 10 : 35 2 **MR. FORD:** So, Your Honor, if I just -- to parse
3 through it --

13 : 10 : 38 4 **THE REPORTER:** I'm sorry. If you could speak into
5 that microphone (indicating) there.

13 : 10 : 38 6 **MR. FORD:** So just to parse through it, we've got the
7 two issues. So we put in and we find out two things, one about
8 the brother-in-law and the transfer of the \$100,000. Obviously,
9 there's a marital dispute happening here. We find out that one
10 of the AUSAs goes and talks, and what we've -- the reason we
11 view it as an exculpatory statement is one *Kyles v. Whitley*,
12 which said if there's any doubt about the investigation, that's
13 fair game.

13 : 11 : 07 14 Now, is that going to be my trial strategy? Don't
15 know, but I'm entitled to at least look at it -- and, two, these
16 sort of contradictory positions where on the one hand they're
17 saying he made \$89, and the other hand they're saying he gave
18 that money to the brother-in-law FBI agent sister. That is a
19 little strange. We just -- normally, when you rob the bank and
20 steal the gold bars, the government doesn't ask we give them to
21 the FBI's agent's sister. So that was that.

13 : 11 : 34 22 We've heard, then, the response of the government
23 well, hey, he should go to jail for trying to get this Brady
24 material. What has happened, you know, they lived apart for
25 some time now in separate houses, obviously really struggling

1 with money. My client is dating somebody. He's in a
 2 relationship.

13:11:51 3 She went out of town to France. They were hanging
 4 out, the soon to be ex-wife, going to the bar, you know, hanging
 5 out; go -- spending time together. When the girlfriend got
 6 back, I think she got very upset. And so at least some of what
 7 then transpired were through these text message communications
 8 that we have a couple things.

13:12:11 9 We have all of their text message correspondence
 10 between Mr. Constantinescu and his wife, as well as eyewitness
 11 testimony that whatever was happening, you know, it wasn't
 12 contentious. I think they were actually really enjoying one
 13 another's company.

13:12:25 14 That said, it leads into another thing that we have
 15 outstanding, which is the money issue that my client is
 16 suffering. I don't want to make this a sort of family law
 17 issue. He wants to be supporting his wife. He has for a long
 18 time --

13:12:37 19 **THE COURT:** Well, I think you made a motion to -- to
 20 sell certain property, and the government has come back,
 21 basically, and said, "We're okay with everything but the
 22 Bentwater house."

13:12:47 23 **MR. ARMSTRONG:** Yep. That's correct.

13:12:48 24 **THE COURT:** All right. And so I'm granting that --

13:12:50 25 **MR. FORD:** Okay.

13:12:51 1 **THE COURT:** -- in hopes that helps ease that pain.

13:12:59 2 **MS. SOLANO:** Your Honor, can I ask, just so I
3 understand: You said you had something *ex parte* that was
4 unflattering. Were they conversations between the divorce
5 attorney and the AUSA, or were they --

13:13:10 6 **THE COURT:** It was with the wife --

13:13:13 7 **MS. SOLANO:** Okay.

13:13:13 8 **THE COURT:** -- recounting conversations with your
9 client.

13:13:16 10 **MR. FORD:** Through the 302, yeah. I mean, that's the
11 sort of thing that -- and I don't think we need to burden you,
12 if you're not interested, but the text message chain, it sounds
13 as exactly what I described. Like, two people who were hanging
14 out while the girlfriend was away, and then the wife [sic] got
15 very angry when she came back into town. So I'll just leave it
16 at that. So I don't think we need to go down the road, if
17 you're not concerned.

13:13:37 18 **THE COURT:** Yeah. I don't think it -- I mean, I'm
19 just telling you I don't think it's dirty laundry you need to
20 air, necessarily, and I'm not going to allow it into evidence,
21 but I can promise you, at least as far as what I've seen, there
22 wasn't anything exculpatory. If anything, it was inculpatory.

13:13:54 23 **MS. SOLANO:** So what we were trying to accomplish and
24 make sure of is our understanding -- and we weren't a party to
25 those conversations, and we don't think that they were

1 memorialized, with the exception of certain e-mails, is in the
2 event that the AUSA was telling the defense attorney on -- or,
3 I'm sorry, the divorce attorney anything related to our client's
4 assets, his availability of those assets to a third party --

5 **THE COURT:** I've seen nothing on that, and I don't
6 know if it exists or not.

14 **MR. ARMSTRONG:** I believe so. They were filed as part
15 of our response.

17 **MS. SOLANO:** So, so long as -- because obviously,
18 right, Brady includes things that are not just in e-mail, right?
19 So to the extent the AUSA had a conversation that he didn't
20 memorialize, right, because he's not an FBI agent, it wouldn't
21 be normal for him to write a report on something like that. If
22 the AUSA had any conversations with the divorce attorney where
23 he was talking about our client's assets or the availability of
24 our assets, we would just ask that the substance of that
25 conversation be provided to us as Brady.

13:15:20 1 **THE COURT:** I don't see how it's Brady either.

13:15:22 2 **MS. SOLANO:** So I think we think it's Brady because if
 3 the AUSA is telling a third party that it's fine for that third
 4 party to have \$10,000 a month of Constantinescu's assets when,
 5 simultaneously, the government -- and particularly on count
 6 21 -- is saying that -- that all of his money is dirty money,
 7 it's forfeitable, it's money laundering, we would respectfully
 8 say that those are inconsistent positions, and it cuts against
 9 the argument that the government thinks that all of his money is
 10 the result of fraud.

13:15:56 11 **THE COURT:** Okay. I'm not seeing that, but -- but --
 12 here's what I'm going to do: Set aside your -- what you filed
 13 on your motion; file me a direct brief saying, "Here's what we
 14 want concerning the FBI, and here's what we want," and then you
 15 guys respond to it --

13:16:20 16 **THE REPORTER:** Your Honor, I'm sorry. I'm having a
 17 hard time hearing you with all of the --

13:16:20 18 *(To the open court as follows.)*

13:16:30 19 **THE COURT:** Can y'all hold it down?

13:16:30 20 *(Discussion at the bench continued as follows.)*

13:16:30 21 **THE COURT:** You know, take ten days. You take
 22 ten days to respond to it. I mean, the response is, "Look, it
 23 didn't happen." That's great. I mean, that -- that eases their
 24 pain, and if it's -- the response is, "Well, it may have
 25 happened, but we don't think it's Brady," then just do that.

1 Let's find that out. And the same thing with the FBI.

13 : 16 : 53 2 Now, let me emphasize to all concerned here that I am
3 a judge from the civil side of things. So I'm kind of allowing
4 discovery on the one hand, as you heard today, but just because
5 it's discovery doesn't mean it's admissible, and just -- you
6 know, so I'm not -- you're going to maybe have to do some
7 convincing to me that that ever comes into evidence on
8 something, but -- but -- so you guys just file a straightforward
9 motion --

13 : 17 : 29 10 **MS. SOLANO:** Yes, Your Honor.

13 : 17 : 30 11 **THE COURT:** -- and -- and you file a straightforward
12 response, and I'll deal with that -- those two issues
13 separately.

13 : 17 : 38 14 But -- and -- because I have not focused on the
15 attorneys talking and why that would be Brady because -- quite
16 frankly, one thing you better put in your motion is explain to
17 me how that's Brady because, right now, I'm not seeing it.

13 : 17 : 54 18 **MS. SOLANO:** Yes, Your Honor. We'll make sure.

13 : 17 : 56 19 **THE COURT:** Okay. All right. Thank you.

13 : 18 : 00 20 **MR. ARMSTRONG:** Thank you Judge.

13 : 18 : 01 21 **MS. SOLANO:** Thank you, Your Honor.

13 : 18 : 02 22 (*End of discussion at bench.*)

13 : 18 : 12 23 **THE COURT:** All right. I'm going to issue a new
24 scheduling order. I am going to set aside days probably in late
25 March. I may try to -- I don't know how -- you know, I'm so old

1 I don't worry about spring break, but I may try to work around
2 the fact that some of y'all may have spring break and kids that
3 you need to attend to. But I'll try to work around the two
4 major spring -- weeks of spring break, but I'll probably hold a
5 couple days' worth of hearings.

13:18:41 6 Keep in mind I want to preadmit everything. So, I
7 mean, when we start the trial, I don't want to have fights over
8 evidence. I want to have those fights resolved because that
9 will speed things up, especially if, you know -- I mean, you
10 think a jury hates you wasting time, when you have to get up and
11 kick them out of the courtroom and bring them back in three or
12 four times, you know, they really hate that.

13:19:12 13 So plan on -- and when you get the order, you'll see
14 it. It'll probably give you a date, but that -- that may be a
15 couple days' worth of hearings, and, you know, you may want to
16 plan your staffing. If you've got somebody that knows, you
17 know, about the case, but there's somebody else that really
18 knows about the exhibits, you know, it's -- that latter person
19 may be the most important person -- the person that actually
20 knows about the documents or knows about the issues will be the
21 one that you may want at that hearing.

13:19:48 22 All right. I will issue that order. Is there any
23 pertinent motion, or any motion at all, that we haven't talked
24 about?

13:19:58 25 Go ahead, Mr. Armstrong.

13:20:01 1 **MR. ARMSTRONG:** Your Honor, just one very discrete
2 issue to raise right now. This is an issue raised by Mr. Lewis.
3 He represented, in a document that was presented to the Court,
4 that Mr. Cooperman has in his possession documents and
5 information that is relevant to this case, and we have made
6 numerous reciprocal discovery requests of all the defendants,
7 and to date we have not received anything in response.

13:20:25 8 So, obviously, if they're sitting on material that's
9 important and that is potentially relevant, we would ask that
10 that information be produced to us by a date certain.

13:20:33 11 **THE COURT:** Who tagged in for Mr. Lewis?

13:20:39 12 **MR. ZADEH:** Sina Zadeh, Your Honor.

13:20:41 13 **THE COURT:** All right. Talk to him, and what I want
14 is I want that produced by the end of the month to the
15 government.

13:20:47 16 **MR. ARMSTRONG:** Does that apply to all defendants,
17 Your Honor?

13:20:49 18 **THE COURT:** Yeah.

13:20:49 19 **MR. ARMSTRONG:** Thank you.

13:20:49 20 **THE COURT:** If anybody owes the government discovery,
21 let's try to get it to them by the end of the month.

13:20:55 22 **MR. ARMSTRONG:** Thank you.

13:20:55 23 **MR. ZADEH:** Yes, Your Honor.

13:20:56 24 **MS. CORDOVA:** Your Honor, we had a motion to compel
25 pending. I don't know if you're going to take that up today.

1 We just mentioned it earlier, the witness statements. The
2 government has done a blanket denial of producing those.

13:21:06 3 **THE COURT:** Tell me: What statements -- are you
4 trying to make them create a statement?

13:21:12 5 **MS. CORDOVA:** No, no, Your Honor. These are e-mails
6 by the case agent and the expert witness that are Jencks
7 material because they relate to the substance of their
8 testimony, and the government has taken the position that any
9 e-mail that is not a -- attaching a final draft affidavit is not
10 a witness statement under Jenks and, therefore, not producible.

13:21:36 11 The way we read the law, it is a question of is that
12 person, is that their -- is it a statement?

13:21:43 13 We're not saying every e-mail ever sent by the
14 testifying agent or the expert witness is Jenks, but what we're
15 saying is it is completely beyond comprehension that there would
16 not be any e-mails about the expert reports; about the
17 affidavits in this case that are not, in fact, Jenks, and we ask
18 for production of those materials.

13:22:02 19 **THE COURT:** All right. Mr. Armstrong, have you
20 replied to that?

13:22:05 21 **MR. ARMSTRONG:** Yes.

13:22:05 22 **THE COURT:** Because I'm not familiar with it. I'll
23 have to study up on that one.

13:22:08 24 **MR. ARMSTRONG:** Yes, Your Honor. We actually filed
25 the law that a draft of a, for example, search warrant, or a

1 draft of an expert report is not Jencks because it is not the
2 final statement that has been approved or adopted by the actual
3 witness. That's why we have disclosures, so that you can
4 actually have the actual statement of the witness as the final
5 copy, and that's the statement.

6 **THE COURT:** Let me look at that issue. I'm not
7 prepared to rule on that.

8 MR. ARMSTRONG: Thank you, Judge.

9 **MS. CORDOVA:** And, Your Honor, one other thing, just
10 for the record. We'll note that we object to the continuance,
11 and we would ask for the earlier date rather than the later
12 date --

3 THE COURT: I understand --

4 MS. CORDOVA: -- but we understand your ruling.

THE COURT: -- and I've overruled that. All right.

16 || Thank y'all.

(Proceedings concluded at 1:22 p.m.)

18 -oo-

19 I certify that the foregoing is a correct transcript
20 from the record of proceedings in the above matter.

22 | Date: September 15, 2023

/s/ Heather Alcaraz
Signature of Court Reporter

MR. ARMSTRONG: [66]

35/23 37/9 38/1 38/4 38/19
 38/22 49/18 49/21 52/25
 53/2 53/10 53/15 54/19 55/8
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MR. CORDOVA: [1]

62/17

MR. FERTITTA: [2]

24/16 49/14

MR. FORD: [20]

40/3 42/11 42/13 42/24 43/3

45/11 46/9 46/13 47/3 47/11

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78/1 87/2 87/6 88/25 89/10

MR. HILDER: [1]

49/13

MR. LEWIS: [6]

14/4 14/6 14/17 17/9 49/10 63/5

MR. MALLETT: [3]

31/10 31/12 49/16

MR. REYES: [2]

28/21 49/12

MR. ROSEN: [8]

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MR. WILLIAMS: [4]

39/17 39/20 81/2 83/8

MR. ZADEH: [2]

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MS. CORDOVA: [12]

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MS. SOLANO: [20]

19/10 19/23 22/23 49/25
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THE CASE MANAGER: [1]

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THE COURT: [134]

THE REPORTER: [4]

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47/20 47/23 48/19 49/4

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1800 [1] 2/4
19 [11] 10/23 13/15 16/6
59/4 82/13 82/14 82/15
82/19 82/25 83/20 83/22
19 -- because [1] 83/9
19 -- I [1] 10/12
1900 [2] 2/25 3/10
1:22 [1] 96/17
1A [1] 69/23
1st [1] 42/15

2

2 percent [1] 32/7
20 [5] 24/21 26/17 32/3 64/1
76/19
200 [2] 2/6 73/9
20005 [1] 1/14
202 [1] 1/14
2021 [6] 41/23 42/14 42/15
44/9 46/23 53/22
2022 [2] 21/8 44/4
2023 [2] 1/9 96/22
20th [1] 20/24
21 [2] 33/14 91/6
212 [1] 1/24
214 [1] 3/14
22 [1] 34/15
225 [1] 2/14
2255s [1] 13/11
227-4444 [1] 2/18
23 [2] 29/7 34/16
2300 [1] 1/16
2323 [1] 3/13
236-1900 [1] 2/25
23rd [5] 5/15 5/17 6/24
16/18 18/7
24 [1] 1/23
25 [1] 76/19
25 megabytes [1] 65/17

250-5584 [1] 3/17
25th [1] 53/22
26 [2] 82/24 83/1
26th [1] 2/14
275 [1] 1/23
29th [1] 34/4
2:55 p.m [1] 7/14

3

3,000,000 [1] 42/17
300 [1] 73/10
302 [1] 89/10
31st [1] 51/3
346 [1] 51/2
350-odd [1] 83/2
353-0801 [1] 1/14
370-1800 [1] 2/4
3700 [1] 1/20
383 [1] 31/20
388 [1] 33/14
397 [21] 5/1 9/13 9/21 9/23
10/10 10/13 11/11 13/14
26/18 42/20 43/1 43/5 57/1
59/5 64/23 67/6 67/25 72/19
72/23 74/13 85/9
397-odd [1] 64/18
3:00 p.m [1] 7/15
3rd [1] 77/19

4

4,500 [2] 25/25 26/2
40 [2] 13/17 69/14
404 [1] 43/6
4444 [1] 2/18
4449 [1] 3/11
45 [10] 10/15 10/19 36/4
36/9 72/25 73/1 74/14 82/25
83/22 85/18
4:22-CR-612 [1] 1/5
4th [1] 77/20

5

503-6388 [1] 1/21
512 [2] 1/21 2/4
515 [1] 3/16
523-7878 [1] 3/4
5300 [1] 2/24
545-9790 [1] 3/7
5584 [1] 3/17
567-9000 [1] 1/17
59 [1] 41/20
5th [4] 33/22 33/24 34/3
77/19

6

60 [1] 28/1
600 [1] 3/13
611 [1] 82/6
612 [1] 1/5
617 [1] 2/15
6187 [1] 3/14
620 [1] 1/20
6388 [1] 1/21
655-9111 [1] 2/12
66 [1] 10/3
6th [1] 33/22

7

700 [1] 2/17
700 percent [1] 11/5
713 [8] 1/17 2/7 2/12 2/18
2/25 3/4 3/11 3/17
723-9900 [1] 2/21
725-8743 [1] 2/7
75 [2] 36/10 36/16
75,000,000 [1] 44/12
750 [1] 2/24
752-4449 [1] 3/11
75201 [1] 3/13
77002 [3] 1/17 3/7 3/17
77006 [1] 2/11
77007 [1] 2/24
77008 [3] 2/7 2/18 2/21
77010 [1] 3/10
77019 [1] 3/4
78701 [1] 2/4
78738 [1] 1/21

7878 [1] 3/4

8

80,000,000 [1] 44/12
8004 [1] 3/16
801 [2] 37/12 37/12
802-9157 [1] 2/15
803 [2] 3/6 81/22
819 [1] 2/11
832 [2] 2/21 3/7
858-0040 [1] 1/24
8743 [1] 2/7

9

9,000,000 [1] 42/16
90 percent [1] 7/6
900-plus [1] 20/12
9000 [1] 1/17
902 [2] 2/20 81/22
9111 [1] 2/12
9157 [1] 2/15
919 [1] 2/3
953-6187 [1] 3/14
9790 [1] 3/7
9900 [1] 2/21

A

A.M [1] 1/6
AARON [1] 1/19
able [9] 22/24 23/3 23/4
32/1 33/19 48/20 62/21
76/18 77/23
about -- because [1] 39/24
about -- go [1] 39/23
above [1] 96/20
absent [3] 25/8 27/7 27/9
absolute [1] 53/6
absolutely [4] 16/15 16/16
18/5 74/14
access [7] 20/7 25/3 27/2
30/22 44/10 44/23 62/18
accessible [2] 22/20 22/22
accomplish [1] 89/23
accounts [1] 62/22

accurate [4] 20/9 20/11
26/14 29/16
acknowledge [1] 27/6
act [2] 27/25 73/23
acted [1] 18/23
acting [3] 35/10 42/2 46/18
action [5] 1/4 74/17 74/17
83/14 83/17
actionable [1] 67/20
active [1] 43/21
actively [1] 27/3
activity [2] 33/5 48/2
actual [15] 20/2 20/2 30/5
34/25 36/19 59/18 64/20
65/16 65/20 67/13 73/5
75/12 77/10 96/2 96/4
actually [38] 4/7 7/23 7/24
11/18 20/9 23/3 23/6 23/8
23/18 25/25 26/12 30/4 30/5
31/4 36/20 37/3 40/12 41/7
50/10 54/17 58/10 60/9
60/24 61/7 62/21 64/20
64/22 65/9 65/15 79/10 81/4
82/9 84/6 85/17 88/12 93/19
95/24 96/4
actually -- so [1] 30/4
acutely [1] 17/1
adamantly [1] 5/3
add [5] 19/12 29/1 36/13
46/7 73/5
add-ons [1] 46/7
added [1] 22/10
addition [4] 19/16 20/17
23/20 24/12
additional [4] 20/25 22/6
35/21 83/1
address [8] 37/24 39/4
49/18 49/19 50/1 64/6 82/1
82/7
addressed [2] 67/2 68/11
adequately [1] 36/5
admissible [8] 17/19 36/20
37/1 37/5 39/12 45/10 45/11
92/5

admission [1] 12/12
adopt [1] 31/19
adopted [1] 96/2
adroitly [1] 17/25
advance [1] 82/2
advises [1] 34/23
affected [1] 82/15
affiant [1] 52/10
affidavit [6] 25/10 52/2
52/2 52/6 52/14 95/9
affidavits [2] 66/8 95/17
affirmative [3] 60/17 72/25
76/4
affirmatively [1] 60/9
after [10] 15/13 19/5 20/18
29/25 37/20 40/25 41/2 51/6
58/25 68/18
again [11] 9/4 9/11 13/17
18/25 46/10 53/2 67/9 74/12
76/13 80/13 83/19
against [4] 11/18 21/18
32/11 91/8
agencies [2] 55/19 85/15
agency [1] 64/8
agent [30] 28/13 50/11
50/16 50/21 50/22 50/22
51/4 51/17 51/22 52/5 52/10
59/25 60/3 60/3 60/5 60/5
60/5 60/6 60/7 60/8 60/9
60/12 60/16 66/13 71/24
86/5 87/18 90/20 95/6 95/14
agent's [2] 65/7 87/21
agents [2] 50/6 60/6
aggregate [1] 82/20
ago [8] 20/21 20/24 29/14
64/1 69/5 69/5 77/17 81/11
agree [10] 8/12 10/11 27/18
45/12 75/4 75/8 76/8 77/24
81/10 81/22
agreed [1] 33/16
agreements [2] 27/5 27/5
ahead [6] 9/4 39/23 61/21
81/1 84/13 93/25
air [1] 89/20

Alcaraz [2] 3/15 96/23
ALEJANDRO [1] 2/2
allegations [1] 59/3
allege [1] 41/18
alleged [7] 5/2 11/8 15/18
24/3 25/23 25/23 50/8
allow [3] 40/7 45/2 89/20
allowed [1] 45/21
allowing [2] 27/21 92/3
almost-as-large [1] 81/11
alone [1] 83/1
along [1] 85/12
already [6] 15/6 29/2 58/13
61/12 78/13 85/18
Alt [1] 64/21
altering [2] 44/6 44/7
alternative [2] 4/14 69/1
although [3] 67/11 78/9
84/9
always [2] 7/5 34/11
AMC [1] 42/6
amend [2] 33/16 84/3
Amendment [3] 13/1 28/16
29/4
AMERICA [1] 1/4
American [1] 17/5
Ameritrade [8] 47/13 47/16
47/17 47/19 63/8 63/11 78/1
78/2
amnesia [1] 37/17
amount [4] 5/22 18/12
26/17 73/12
ample [1] 14/12
analyses [1] 58/24
analysis [6] 30/18 52/7 55/8
55/18 57/21 60/18
analyst [2] 51/3 52/12
analyzed [2] 5/25 21/10
ANDREW [2] 1/8 2/16
angry [1] 89/15
ankle [1] 5/8
another [7] 8/8 11/14 30/7
34/9 82/24 83/1 88/14

another's [1] 88/13
answer [9] 17/6 69/6 71/7
71/7 71/22 71/23 77/13 79/7
79/12
answers [1] 79/8
antagonistic [1] 38/10
any -- any [2] 10/16 66/8
anybody [5] 28/19 47/22
65/3 81/5 94/20
anybody's [1] 83/18
anymore [1] 77/25
anyone [2] 32/12 49/7
anyone's [1] 29/7
anything [17] 10/20 24/2
24/9 24/10 28/9 43/12 45/7
47/24 56/10 57/7 57/17
82/23 86/13 89/22 89/22
90/3 94/7
anyway [2] 78/7 80/24
anywhere [3] 17/4 74/13
78/17
apart [1] 87/24
apologize [1] 58/20
appear [2] 12/6 83/14
APPEARANCES [3] 1/10
2/1 3/1
appeared [1] 15/12
appears [5] 21/24 43/16
46/11 47/15 51/1
Applegate [5] 59/25 60/3
60/8 60/12 60/16
apply [1] 94/16
appreciate [2] 31/8 56/12
appreciate -- I [1] 56/12
approach [9] 14/4 19/8
24/20 26/13 30/2 31/10
53/13 66/6 66/15
appropriate [1] 29/19
approved [2] 66/9 96/2
April [8] 69/8 76/15 76/16
76/20 80/25 82/2 83/8 85/3
are -- is [1] 26/8
are -- it [1] 30/14
are -- with [1] 12/15
aren't [5] 29/25 39/10 42/9
57/1 76/6
arguably [1] 17/3
argue [2] 76/7 76/9
arguing [1] 76/5
argument [2] 55/2 91/9
ARMSTRONG [15] 1/12
35/24 39/24 40/13 41/15
48/10 52/24 63/20 65/2
67/23 69/19 71/4 86/8 93/25
95/19
around [10] 6/25 16/22
38/18 45/21 53/24 76/25
81/19 83/3 93/1 93/3
arrest [1] 60/14
arrested [1] 60/15
article [2] 25/16 25/19
articles [1] 40/25
as -- as [1] 23/22
Ashcroft [1] 2/3
aside [2] 91/12 92/24
ask [22] 10/9 27/20 28/11
34/1 35/20 49/3 53/8 53/8
56/13 56/20 58/10 58/11
64/7 64/23 65/20 87/20 89/2
90/8 90/24 94/9 95/17 96/11
asked [1] 66/17
asking [4] 27/14 58/9 80/12
82/14
aspersions [3] 14/20 15/4
17/17
assembled [1] 25/5
asserted [1] 4/20
assess [1] 24/24
assets [6] 52/20 90/4 90/4
90/23 90/24 91/4
assist [1] 34/22
assistance [2] 29/7 35/19
Associates [1] 2/10
assure [3] 15/15 15/23
41/16
Atlas [3] 26/24 27/1 43/24
attached [2] 90/7 90/11
attaching [1] 95/9

attack [2] 4/7 52/17
attacking [1] 51/13
attempt [1] 75/13
attempting [1] 75/22
attend [1] 93/3
attention [5] 24/11 31/9
40/7 49/1 75/9
attenuate [1] 16/11
attestations [1] 27/5
attorney [12] 3/3 28/15
29/22 36/24 52/20 53/19
54/21 89/5 90/2 90/3 90/10
90/22
Attorney's [1] 1/16
attorneys [5] 20/14 45/12
76/19 77/2 92/15
attributable [2] 40/24 44/12
attributed [1] 41/19
August [3] 20/24 21/5 34/4
August 16th [2] 20/24 21/5
August 29th [1] 34/4
AUSA [6] 20/20 89/5 90/2
90/19 90/22 91/3
AUSAs [1] 87/10
Austin [3] 1/21 2/4 15/10
authenticate [1] 77/8
authentication [1] 18/14
authenticity [1] 12/20
author [1] 15/7
automatic [1] 9/9
availability [2] 90/4 90/23
available [1] 27/7
Avenue [4] 1/13 1/23 2/3
3/13
average [2] 13/2 13/3
average -- we [1] 13/2
avoid [1] 82/7
aware [4] 34/14 38/24
60/12 63/1
away [3] 29/19 76/20 89/14
awful [1] 77/2
Axiom [1] 21/13

back [32] 10/2 17/11 18/12
20/5 21/15 22/1 22/19 23/13
23/17 28/6 29/15 30/5 36/12
37/18 41/15 41/16 53/25
54/1 55/11 62/21 65/14
65/21 66/23 71/3 73/3 73/4
78/14 84/18 88/6 88/20
89/15 93/11
back-door [2] 41/15 41/16
backlog [1] 16/10
ball [1] 24/12
ballpark [1] 72/2
bank [6] 50/18 50/19 50/20
54/9 61/24 87/19
bar [1] 88/4
bars [1] 87/20
based [6] 13/7 22/6 43/14
67/12 84/2 86/19
bases [4] 20/13 28/25 29/18
30/1
basic [1] 85/1
basically [8] 6/10 6/11 6/16
67/12 69/8 77/7 86/18 88/21
basis [2] 30/17 30/24
Bates [1] 61/16
bathroom [1] 9/8
be -- the [1] 70/23
be -- to [1] 49/6
bear [1] 39/9
beat [1] 80/22
beating [1] 16/25
been [29] 4/22 7/20 8/7 13/6
13/19 15/6 15/9 15/10 15/16
16/7 17/3 20/11 26/18 38/17
38/21 40/17 43/15 43/16
43/21 46/21 51/4 59/21
61/12 61/13 64/7 72/16
75/24 80/5 96/2
beeps [1] 5/8
before [26] 1/8 13/24 13/24
17/3 18/15 22/9 28/20 29/11
30/23 30/25 35/17 36/10
36/11 36/16 39/13 42/5

46/17 49/23 52/16 53/5 56/5
58/25 60/14 79/9 84/4 84/24
beforehand [1] 19/5
begin [1] 24/13
beginning [1] 16/17
behalf [4] 4/6 4/19 5/20
28/22
behavior [1] 29/23
behind [2] 34/18 74/18
beholden [1] 84/16
being [10] 36/2 36/3 36/4
39/7 52/4 53/5 55/8 56/3
56/4 70/17
believe [16] 16/25 30/12
33/1 33/2 40/5 40/14 44/10
47/23 48/4 51/9 53/12 59/24
60/13 72/3 90/7 90/14
believed [1] 72/13
believes [1] 32/14
below [1] 12/12
bench [3] 86/8 91/20 92/22
beneath [1] 81/23
Bentwater [1] 88/22
besides [1] 47/1
best [4] 63/24 78/15 80/7
80/8
better [5] 6/8 71/17 79/11
85/17 92/16
between [13] 7/13 14/3 35/9
37/13 42/14 42/14 53/17
66/13 70/13 74/16 83/8
88/10 89/4
beyond [2] 25/7 95/15
big [10] 9/2 9/15 9/15 11/17
26/1 46/20 68/19 70/2 76/3
80/1
bigger [3] 46/20 80/2 84/20
billion [1] 64/1
bit [7] 4/3 30/3 37/21 53/4
61/19 65/14 72/24
blanket [1] 95/2
blazing [1] 25/18
blotters [1] 61/25
blunt [1] 86/17

boggling [1] 55/4
books [2] 8/4 8/4
Boom [1] 9/3
born [1] 81/14
Boston [1] 2/14
both [7] 26/14 32/10 67/12
67/16 67/19 81/8 84/16
bots [4] 26/8 26/10 26/11
26/12
bought [6] 18/25 32/2 41/12
45/18 48/13 72/7
Boulevard [4] 2/6 2/11 2/17
2/20
box [1] 9/19
boxes [1] 17/13
Brady [27] 30/8 40/5 40/9
47/2 49/2 50/2 51/9 51/14
51/19 51/25 56/8 58/13
58/14 58/15 59/11 60/21
60/21 60/22 67/3 87/23
90/18 90/25 91/1 91/2 91/25
92/15 92/17
branches [1] 46/22
BRANDON [1] 3/2
break [4] 66/23 93/1 93/2
93/4
brief [4] 25/11 29/2 29/10
91/13
briefings [1] 90/10
briefly [5] 5/20 14/7 28/21
47/4 64/6
bring [6] 15/22 57/1 75/15
79/6 79/17 93/11
brings [1] 41/17
broad [1] 59/9
broker [6] 47/7 47/11 48/3
63/6 63/15 63/17
brokerage [1] 63/11
brother [4] 50/22 86/5 87/8
87/18
brought [3] 14/10 40/6
54/21
BROWN [1] 2/19

Bryan [1] 60/4
Bs [7] 47/6 47/18 47/20
47/23 48/19 49/4 61/11
bucket [3] 51/15 51/20
52/18
buckets [1] 50/3
budgeted [1] 35/16
bugged [1] 81/3
built [1] 76/25
bulk [1] 18/9
bunch [2] 11/21 82/17
burden [1] 89/11
bureaucracies [2] 84/17
84/24
buried [1] 21/6
bus [1] 43/17
business [4] 77/12 77/14
78/5 81/22
buy [8] 9/15 32/5 32/10
32/13 53/25 54/1 72/15
72/16
buying [2] 29/24 30/14
buys [2] 8/22 23/23

C

calculation [1] 42/19
call [4] 32/2 34/6 35/14
82/24
called [2] 41/7 77/25
came [8] 22/2 40/21 42/3
44/13 45/5 45/20 68/18
89/15
camera [1] 66/17
can -- we [1] 9/16
Can -- what's [1] 63/10
can't [15] 19/15 26/19
34/10 37/3 45/23 56/9 56/20
56/21 62/25 70/1 70/2 70/16
70/18 77/25 83/21
cannot [4] 17/2 29/6 36/5
44/20
captures [1] 54/11
care [2] 51/6 51/17
carefully [1] 32/9
CARTER [4] 1/15 53/1

86/25 90/9
case [92] 5/1 5/4 5/22 6/9
6/11 6/19 6/20 8/10 10/22
12/24 13/3 13/23 14/3 14/12
14/18 15/6 15/12 16/15 18/4
19/11 19/18 19/21 19/25
21/3 21/8 21/21 24/15 28/17
29/3 29/7 30/2 30/3 30/16
31/2 31/16 31/17 33/13
35/13 36/7 36/9 38/18 39/4
39/5 41/10 41/14 43/8 43/18
44/17 46/20 46/20 48/25
49/9 51/4 52/19 56/5 57/12
60/7 60/10 60/17 60/20
60/24 61/24 67/16 67/17
69/17 70/3 70/7 70/9 70/10
70/16 70/17 71/5 71/19
71/21 71/23 71/24 71/25
74/8 75/11 75/13 75/23
76/13 76/17 76/24 80/16
81/12 84/6 84/23 93/17 94/5
95/6 95/17
case -- this [1] 46/20
caseload [1] 16/13
cases [9] 13/4 16/6 16/13
16/14 32/2 35/12 35/13 70/5
83/15
cases -- every [1] 16/13
cash [1] 8/8
cast [2] 14/20 17/17
casting [1] 15/4
categorical [3] 37/13 66/6
66/15
categorically [1] 37/10
categories [4] 47/3 54/16
54/17 59/12
category [3] 48/24 49/1
49/17
causation [15] 31/1 31/1
39/11 39/11 40/14 41/6 41/9
41/17 44/18 44/20 76/4 76/5
76/7 76/9 76/24
cause [3] 32/16 40/20 81/9
caused [9] 30/14 31/2 31/3

caused... [6] 41/11 42/6
42/8 44/21 45/6 76/12
causes [1] 40/19
causing [1] 40/23
cautious [1] 32/9
certain [7] 21/14 22/23
29/24 30/15 88/20 90/1
94/10
certainly [4] 10/24 56/11
62/12 74/23
certainty [2] 40/4 56/21
certify [1] 96/19
cetera [1] 14/20
chain [1] 89/12
chains [1] 12/7
chair [6] 42/1 42/2 42/3
42/7 44/4 46/18
challenge [1] 29/19
challenges [1] 81/9
challenging [1] 81/16
chambers [1] 86/24
chance [1] 26/19
chances [1] 83/20
change [3] 33/17 35/6 85/2
changes [4] 9/6 9/10 30/1
40/23
channel [1] 26/25
charged [9] 9/22 11/3 11/25
13/17 64/18 64/22 71/14
72/2 75/24
charged -- we [1] 11/25
charging [1] 44/3
Charles [1] 7/25
charts [10] 6/1 9/14 11/15
23/20 23/22 71/18 75/12
75/17 77/1 81/21
chase [3] 39/10 39/11 39/11
check [2] 23/17 65/25
checking [1] 21/13
chide [1] 33/7
child's [1] 81/13
China [1] 57/8
CHIP [1] 3/2

choosing [1] 75/11
chose [2] 48/6 52/15
Christmas [1] 16/22
Circuit [4] 38/7 67/12 67/17
81/24
circumstances [1] 24/14
cited [1] 56/4
civic [1] 80/8
civil [2] 16/2 92/3
claim [3] 28/25 35/10 67/15
claiming [1] 35/8
claims [1] 61/7
clear [5] 31/4 38/7 54/14
61/18 76/20
clearer [1] 15/3
clearly [3] 28/2 31/2 77/20
client [27] 15/18 17/21
18/14 18/19 24/8 25/22 28/8
41/10 42/13 42/15 43/9
43/11 44/12 44/16 45/2 45/5
45/15 46/10 47/12 50/13
50/20 69/4 80/14 82/23 88/1
88/15 89/9
client's [13] 11/2 12/25
17/11 38/20 41/1 47/23 49/5
50/23 52/20 64/18 78/16
90/3 90/23
clients [3] 13/16 28/3 80/18
clients' [1] 13/1
close [1] 74/13
cloud [2] 4/21 5/7
co [1] 60/6
co-leads -- or [1] 60/6
cocounsel [1] 12/21
cocounsel's [1] 24/18
code [1] 27/4
codefendants [10] 4/24
5/10 26/17 33/1 33/5 48/21
49/7 54/18 59/14 59/19
codefendants' [3] 5/13
62/24 77/2
coding [1] 26/24
cogent [1] 57/24
cognizable [1] 61/7
coincidence [1] 44/4
collaboration [1] 32/23
colleague [2] 40/7 75/22
colleagues [4] 13/5 29/5
29/13 82/16
collect [1] 62/23
combat [1] 57/15
combined [2] 16/2 45/3
come [15] 9/11 9/12 10/2
16/20 16/21 20/22 34/16
45/17 46/24 66/23 76/10
78/4 78/13 81/6 88/20
come -- it [1] 16/20
comes [3] 37/11 38/9 92/7
coming [4] 11/22 43/7 56/3
72/20
comment [1] 31/15
comments [2] 24/18 86/19
Commission [2] 41/21
75/15
commit [3] 11/9 60/24
73/16
committed [3] 10/21 73/16
75/17
committing [1] 10/20
communication [2] 43/21
47/16
communications [5] 70/13
86/12 88/7 90/11 90/13
company [1] 88/13
compare [3] 11/18 22/13
22/14
compel [8] 33/9 39/16 39/18
40/9 41/17 55/1 66/5 94/24
compelling [6] 38/4 38/8
38/8 38/15 39/10 71/18
compiled [1] 14/23
complaining [1] 34/2
complaints [1] 35/6
complete [1] 36/18
completely [3] 10/11 36/18
95/15
complex [2] 13/4 38/17
complexity [2] 16/14 29/10

complicated [1]	27/12	45/7 53/17 53/19 53/20 53/23 54/4 54/7 60/13 60/23 63/8 88/10	copies [2] 65/15 79/8 copy [1] 96/5
complied [1]	37/20	Constantinescu's [8] 29/21 30/10 33/9 39/18 53/19	copying [1] 63/20
compliment [1]	24/22	54/20 86/3 91/4	CORDOVA [6] 3/9 4/18 27/16 38/2 68/9 69/4
comprehension [1]	95/15	constantly [1] 32/19	Cordova's [1] 37/15
comprise [1]	7/12	constitutional [2] 28/4 35/19	core [1] 5/3
computer [2]	3/25 5/25	consultant [1] 34/21	corner [1] 37/4
computers [1]	9/7	contained [1] 59/6	corporate [1] 25/19
concede [1]	45/23	contemporaneous [1] 74/15	correct [6] 12/17 29/25 32/17 53/3 88/23 96/19
concept [1]	60/21	contention [1] 6/12	corrected [2] 35/4 85/7
concern [4]	23/14 29/6 69/22 84/15	contentious [1] 88/12	correspondence [1] 88/9
concerned [3]	61/19 89/17 92/2	contest [1] 24/10	could [23] 11/9 11/9 15/3 24/7 26/16 30/2 30/2 36/15
concerning [1]	91/14	context [4] 7/23 15/3 15/20 19/1	41/1 46/24 49/8 49/18 60/25
concerns [1]	35/1	continuance [15] 4/13 4/14 24/15 24/18 27/15 29/9 30/8	61/1 61/15 76/8 81/7 81/17
concert [1]	74/16	31/19 33/10 39/21 68/25	83/8 83/10 83/11 84/25 87/4
concise [3]	48/1 48/8 80/16	69/3 78/24 81/14 96/10	counsel [6] 4/4 5/13 30/10 35/19 61/11 62/24
conclude [1]	40/13	continued [4] 2/1 3/1 48/14 91/20	count [7] 67/2 70/25 70/25
concluded [1]	96/17	contradictory [1] 87/16	70/25 78/20 78/20 91/5
conclusion [1]	58/24	contradicts [1] 59/2	counting [2] 5/23 29/8
conclusions [1]	59/3	contrary [1] 66/16	counts [5] 15/20 18/20 28/7
conducted [1]	43/25	control [4] 16/8 16/9 16/10 44/15	68/11 72/1
confer [1]	13/10	controlling [1] 12/23	couple [7] 13/8 13/25 29/1
confines [1]	49/9	conversation [5] 12/8 17/15 46/1 90/19 90/25	65/23 88/8 93/5 93/15
Congrats [1]	54/5	conversations [7] 52/18 52/21 86/11 89/4 89/8 89/25 90/22	couple-month [1] 13/8
Congress [5]	2/3 42/4 42/5 46/17 46/19	convicted [1] 7/8	course [14] 24/21 29/19
congressional [3]	41/24 46/5 46/6	conviction [2] 80/19 83/25	36/6 50/19 52/13 59/20
conservative [2]	75/21 76/23	convincing [2] 74/9 92/7	59/22 66/2 68/3 70/18 72/11
consider [4]	56/18 79/2 80/16 83/25	cooperators [1] 71/21	74/19 78/5 86/1
consideration [2]	78/25 82/4	COOPERMAN [7] 3/2 16/17 17/2 27/14 49/10 63/6 94/4	court [43] 1/1 3/15 3/16 6/13 9/16 14/3 14/11 14/13
considered [1]	50/2	Cooperman's [1] 36/24	14/16 15/15 15/15 16/16
consistently [1]	18/23	coordinate [1] 76/18	16/19 16/20 16/20 16/22
conspiracy [11]	15/19 32/23 38/24 38/25 43/6 47/25 50/8 50/13 59/5 74/17 83/21	coordinating [1] 74/17	16/23 16/25 17/6 17/6 17/14 17/18 17/25 18/5 27/20
CONSTANTINESCU [16]	1/6 1/18 19/12 39/15 41/18		28/11 28/25 32/21 35/14 35/20 38/7 38/24 43/14 52/16 53/14 64/4 67/13 67/16 83/25 86/24 91/18 94/3 96/23
			Court's [7] 14/10 15/22

Court's... [5] 16/2 31/8
31/14 31/15 40/6
courtesy [1] 60/14
courtroom [4] 37/18 80/1
81/12 93/11
courtrooms [1] 80/3
cover [1] 4/5
covered [2] 65/4 68/24
COVID [1] 16/10
CR [1] 1/5
crawl [1] 22/19
crazy [1] 12/5
create [3] 11/16 48/6 95/4
created [1] 28/5
creates [1] 20/19
creating [1] 48/15
credibility [2] 51/13 52/17
crime [1] 7/8
criminal [4] 1/4 6/8 16/2
64/15
crisp [1] 80/4
critical [4] 8/10 8/18 9/25
48/25
criticizing [1] 51/12
cross [10] 11/12 52/9 61/2
70/10 71/13 71/14 77/21
78/15 83/12 84/4
cross-examination [4] 61/2
70/10 77/21 78/15
cross-examinations [1]
84/4
cross-examine [3] 11/12
52/9 83/12
crossed [1] 85/12
crucial [2] 30/12 30/12
cry [1] 37/20
CSR [1] 3/15
cumulative [1] 10/25
current [3] 17/5 42/3 46/18
currently [4] 22/20 23/1
30/8 40/4
custody [1] 86/19
cute [1] 40/21

cutesy [1] 40/15
cutoff [1] 34/3
cuts [1] 91/8
CYA [1] 69/17

D

Dallas [1] 3/13
dark [1] 44/7
darndest [1] 86/1
data [32] 5/24 6/20 10/4
20/7 21/10 21/18 22/7 22/23
23/8 24/19 24/20 24/24 25/3
25/3 25/5 25/7 25/9 25/12
25/13 25/20 26/4 26/10
26/14 26/14 26/15 26/22
26/24 26/24 27/2 65/6 65/23
71/16
data-driven [1] 24/20
database [2] 22/19 23/2
date [11] 5/15 5/17 19/15
33/22 37/18 93/14 94/7
94/10 96/11 96/12 96/22
dated [1] 34/4
dating [1] 88/1
DAVIS [2] 2/16 2/17
day [25] 8/1 8/4 8/15 9/7
29/24 31/21 31/23 32/3 32/8
32/18 33/19 35/2 37/12 44/3
44/5 48/13 60/13 71/19
71/20 71/22 71/24 71/24
83/3 83/9 84/4
days [12] 16/23 28/1 36/4
36/9 36/10 36/16 67/23 68/4
79/9 91/21 91/22 92/24
days -- I'm [1] 36/9
days' [2] 93/5 93/15
DC [1] 1/14
dead [1] 16/25
deadline [3] 20/18 36/12
36/16
deadlines [1] 33/12
deal [8] 35/8 44/8 48/24
70/21 81/23 84/1 84/20
92/12
dealer [2] 47/12 48/3

dealers [3] 47/7 63/15 63/18
dealing [1] 83/20
dealt [1] 84/23
death [1] 15/13
debate [2] 26/9 55/5
deceived [1] 72/17
deceiving [1] 67/19
December [4] 4/22 5/5 44/3
48/11
December 13th [1] 48/11
December 14th [1] 44/3
decided [1] 37/18
decision [4] 19/19 44/19
45/23 72/16
declaration [1] 33/6
declare [1] 69/10
declared [1] 70/14
declined [1] 35/13
decreases [1] 44/14
DEEL [4] 2/16 24/17 29/1
49/14
deemed [1] 45/6
defeat [1] 10/2
defeats [1] 8/11
defend [2] 5/13 34/10
defendant [18] 1/18 2/2 2/8
2/16 2/22 3/2 3/8 24/2 32/21
32/22 34/9 37/3 38/12 47/19
70/9 70/11 72/13 82/20
defendant's [2] 33/14 72/18
defendants [31] 5/5 6/12
6/13 7/23 12/10 23/25 27/22
36/9 38/11 40/23 43/22
47/12 54/13 54/24 55/16
56/1 57/16 57/24 58/14
58/18 61/23 62/9 63/8 71/11
71/13 72/24 74/16 78/11
83/10 94/6 94/16
defendants -- and [1] 6/12
defendants -- but [1] 62/9
defendants' [6] 4/17 6/22
14/19 16/9 28/16 37/14
defense [17] 19/14 20/14
26/20 28/15 28/19 30/12

defense... [1] 31/17 47/22
49/3 62/23 70/22 74/6 74/25
75/10 75/19 82/21 90/2
defense -- other [1] 62/23
defenses [1] 38/10
defer [1] 39/22
defining [1] 12/11
definitely [3] 12/18 38/22
51/14
definition [1] 46/16
defraud [4] 7/9 7/12 8/11
9/12
degree [2] 38/15 40/3
delays [1] 16/11
delivery [2] 21/11 34/4
denial [1] 95/2
denied [1] 39/22
dense [2] 5/24 22/23
denying [4] 68/8 68/14
68/20 68/25
Department [1] 1/13
depend [1] 13/1
depend -- depends [1] 13/1
depending [3] 30/4 64/15
72/11
depends [1] 13/1
describe [2] 40/18 56/21
described [4] 36/2 36/3
36/4 89/13
descriptions [1] 48/1
designate [2] 69/16 80/24
designated [2] 38/17 69/14
designations [1] 69/13
detail [1] 30/10
details [4] 25/11 25/12
25/19 56/19
details -- and [1] 25/11
determine [2] 17/19 66/18
determined [6] 30/14 41/21
44/13 46/3 50/10 51/11
develop [2] 8/8 8/9
devils [1] 56/19
diced [1] 12/6

dictate [1] 82/20
didn't [25] 5/1 19/25 24/9
24/10 30/7 33/23 44/16
48/22 51/6 51/6 51/11 51/17
53/25 57/17 59/10 59/17
65/5 70/25 70/25 70/25
73/16 85/5 86/20 90/19
91/23
didn't -- it's [1] 19/25
difference [2] 37/13 73/18
differences [1] 17/14
different [8] 6/25 11/21
11/22 37/10 41/6 43/10
43/11 72/11
difficult [2] 20/14 20/21
difficulty [1] 39/4
dig [2] 20/19 26/20
dilatory [1] 37/16
diligently [1] 27/11
Dillon [3] 60/5 60/6 60/7
dire [3] 79/4 79/15 84/4
direct [4] 14/19 53/17 74/16
91/13
directly [1] 82/10
dirty [3] 52/4 89/19 91/6
disadvantage [1] 43/1
disagree [1] 81/6
disagreement [1] 50/1
disciplined [1] 26/13
disclose [1] 41/5
disclosed [4] 49/9 51/23
51/23 52/6
disclosed -- he [1] 51/23
disclosure [3] 14/17 51/22
51/24
disclosures [1] 96/3
Discord [2] 26/24 43/24
discovery [11] 33/25 34/3
34/12 50/19 52/13 65/4 70/2
92/4 92/5 94/6 94/20
discrepancies [1] 21/12
discrepancy [3] 21/25 22/3
22/17
discrete [3] 26/18 85/11

94/1 Page 106 of 133
discuss [5] 37/23 47/4 47/5
49/1 86/23
discussed [1] 90/9
discusses [1] 66/7
discussing [2] 45/13 46/2
discussion [4] 14/3 86/8
91/20 92/22
disk [1] 34/5
dismiss [8] 28/7 67/9 68/1
68/7 68/13 68/17 68/19
68/21
disposed [1] 16/7
disprove [1] 48/9
dispute [1] 87/9
distinction [1] 55/23
DISTRICT [4] 1/1 1/1 1/9
16/2
dividend [2] 70/14 70/15
DIVISION [1] 1/2
divorce [5] 52/20 89/4 90/3
90/9 90/22
do -- but [1] 7/1
document [5] 14/16 31/20
53/14 62/1 94/3
documents [10] 30/18
30/22 47/1 47/18 48/4 54/24
56/20 66/18 93/20 94/4
does [17] 6/9 7/11 16/14
31/16 31/18 38/18 40/14
49/7 58/1 62/17 65/1 65/3
73/13 73/14 73/18 87/1
94/16
Does -- I [1] 65/1
doesn't [16] 20/7 23/9 28/13
32/15 33/23 57/7 57/25
60/23 62/16 82/22 82/22
82/23 83/14 84/5 87/20 92/5
dog [1] 78/20
doing [21] 6/15 6/17 6/17
13/5 18/4 19/4 19/5 20/4
22/7 26/19 27/3 35/1 47/23
48/16 56/24 64/20 72/14
73/4 73/20 73/22 76/2

DOJ [5] 24/22 43/14 43/18
58/25 64/15
DOJ's [1] 59/7
dollars [1] 51/18
don't -- I [1] 69/25
don't -- we [1] 86/23
don't -- you've [1] 57/23
done [8] 13/14 18/12 20/11
33/18 33/24 79/6 83/21 95/2
door [2] 41/15 41/16
double [1] 13/15
doubt [4] 16/20 43/13 43/13
87/12
down [22] 9/11 9/12 10/22
11/6 13/12 13/17 13/23
16/22 26/25 34/16 40/21
41/13 42/18 44/21 46/14
49/24 61/5 77/22 78/4 78/19
89/16 91/19
down -- this [1] 9/11
download [1] 23/4
dozen [1] 44/1
Dr. [1] 11/10
Dr. Garibotti [1] 11/10
draft [4] 63/21 95/9 95/25
96/1
drafting [1] 52/14
dragged [1] 45/15
drive [5] 2/24 3/3 34/6 34/8
34/10
driven [1] 24/20
driving [1] 43/16
drug [1] 70/17
dude [1] 54/3
due [2] 5/12 35/19
dump [9] 10/2 10/3 11/17
12/11 12/13 18/1 37/4 40/15
64/21
dumping [1] 11/23
dumps [2] 9/22 75/24
duration [1] 43/22
during [8] 25/14 35/18 42/1
45/19 48/10 50/7 50/7 50/12

duty [2] 80/7 80/8

Dynamis [1] 2/13

E

e-mail [8] 21/6 21/9 34/10
66/7 66/13 90/18 95/9 95/13
e-mails [7] 33/14 33/17 59/7
90/1 90/8 95/5 95/16
E-Trade [2] 65/13 65/21
E-X-P-R [1] 46/14
each [17] 11/10 12/16 15/18
20/18 22/10 23/18 24/1
24/25 41/7 41/8 61/19 62/5
65/17 70/9 71/22 77/2 81/19
earlier [3] 7/22 95/1 96/11
early [3] 13/8 39/5 41/23
ease [1] 89/1
eases [1] 91/23
easiest [1] 54/22
easily [1] 48/9
ECF [1] 51/2
echo [1] 24/18
Eddie's [2] 52/3 52/4
educational [1] 27/6
EDWARD [4] 1/6 2/23
19/11 31/12
effective [3] 26/20 29/7
35/19
effectively [1] 83/13
efforts [1] 50/9
eight [2] 48/21 70/7
eight-party [1] 70/7
either [8] 44/20 50/5 50/9
51/10 57/22 76/5 85/15 91/1
elaborate [1] 14/7
electronic [2] 23/3 23/8
element [1] 44/20
elephant [2] 4/10 82/12
ELMO [2] 53/7 53/11
else [5] 28/19 38/14 65/3
78/22 93/17
embarrassed [1] 33/8
embroiled [1] 15/10
emphasize [1] 92/2
employee [1] 64/10

end [5] 23/6 48/8 92/22
94/14 94/21

endeavor [1] 76/14
ended [1] 44/17

endlessly [1] 48/5
Energy [1] 25/18
enjoying [1] 88/12

enormous [4] 23/19 25/3
26/17 65/18
enough [3] 67/23 80/1
85/23

Enron [2] 15/24 70/17

enter [1] 49/8

entered [1] 25/2

entire [3] 17/3 18/25 25/5

entitled [4] 57/6 57/15
57/18 87/15

entries [1] 48/18

envelope [2] 34/3 34/6

envelopes [2] 34/16 34/18

episode [3] 24/2 46/11
79/21

episodes [15] 5/1 11/1 18/21
24/1 24/8 24/11 42/21 44/25
45/24 59/5 67/6 72/20 73/1
73/5 85/11

Epley [1] 15/9

ERIC [2] 2/13 5/20

errors [1] 15/6

especially [3] 38/16 74/3
93/9

essential [2] 47/21 48/19

essentially [1] 49/5

estimate [2] 75/21 76/23

estranged [2] 50/23 51/18

et [1] 14/20

et cetera [1] 14/20

evaluate [1] 14/12

even [22] 5/4 11/8 14/13
15/7 18/6 24/10 24/25 27/23

28/7 29/16 38/7 45/9 45/17
50/12 56/5 56/21 60/11
60/12 62/14 64/18 73/9
77/25

event [3] 39/21 39/21 90/2
event -- in [1] 39/21
eventually [1] 80/14
ever [5] 13/5 13/5 53/25
92/7 95/13
every [15] 9/25 10/6 11/10
12/17 12/25 15/18 16/13
20/5 22/10 29/18 36/7 53/21
62/1 66/13 95/13
everybody [6] 63/22 77/16
78/11 78/21 79/8 81/23
everybody's [2] 63/14 69/9
everyone [4] 13/22 38/14
39/1 39/2
everything [6] 10/5 27/18
68/24 77/8 88/21 93/6
evidence [33] 5/22 15/2
15/25 19/20 22/15 23/12
29/15 29/15 31/4 32/14
36/19 36/22 37/4 37/5 38/5
39/21 39/25 41/8 45/17
54/12 55/6 56/1 57/24 58/8
58/17 71/18 72/25 75/12
82/12 86/22 89/20 92/7 93/8
ex [2] 88/4 89/3
ex-wife [1] 88/4
exact [6] 37/18 40/10 44/3
44/5 46/7 46/18
exactly [6] 8/16 8/18 10/4
62/4 74/18 89/13
examination [4] 61/2 70/10
77/21 78/15
examinations [1] 84/4
examine [3] 11/12 52/9
83/12
example [14] 11/14 15/22
20/23 34/2 36/24 36/25
38/11 38/13 54/14 54/19
54/20 54/22 57/12 95/25
examples [2] 36/21 39/11
Excel [1] 48/18
except [1] 66/9
exception [2] 67/3 90/1

exchange [1] 41/20 53/17
53/22 75/15
exclude [5] 12/19 28/12
44/20 67/5 74/1
exclusion [2] 27/21 28/6
exculpatory [16] 31/4 40/6
44/11 51/1 55/25 58/2 58/17
59/6 59/11 59/12 63/23 65/6
85/20 86/13 87/11 89/22
excuse [1] 46/24
executing [1] 54/13
executions [1] 11/21
exercise [1] 81/8
exhibit [20] 6/5 14/22 15/4
17/10 18/13 19/19 20/15
22/14 23/7 33/13 33/16 41/6
53/12 53/16 54/25 55/4 62/7
63/13 63/16 84/3
exhibits [30] 12/3 12/16
12/17 13/10 14/9 14/18
14/23 15/11 17/18 18/9
19/24 20/5 20/12 22/15
22/18 23/11 23/12 29/14
36/9 36/13 36/14 36/15
36/16 41/7 69/15 70/6 73/1
73/7 75/12 93/18
exist [3] 40/2 40/5 58/1
existed [1] 62/22
exists [3] 40/4 57/25 90/6
expanded [2] 11/19 11/21
expected [1] 80/21
expenses [1] 34/20
experience [8] 27/20 28/14
28/14 66/12 75/23 79/11
80/5 81/7
experienced [1] 44/14
expert [16] 11/11 35/5
37/19 41/4 41/5 48/6 64/10
66/8 66/10 66/10 66/13
71/16 95/6 95/14 95/16 96/1
expert's [1] 46/11
expert-signed [1] 66/10
experts [3] 75/13 75/16
76/25

explain [10] 6/6 6/18 6/20
20/15 29/5 34/7 58/13 73/11
73/20 92/16
explained [1] 28/25
explains [2] 34/5 73/23
explore [1] 81/10
export [1] 23/10
exports [2] 21/24 23/15
expounded [1] 53/19
EXPR [7] 53/3 53/20 53/21
53/23 53/24 54/11 54/19
express [5] 42/6 42/17
46/14 82/4 82/23
extend [1] 33/22
extension [1] 13/8
extent [9] 6/19 21/23 37/6
58/13 59/11 61/4 81/8 84/16
90/19
external [2] 26/5 26/21
extraneous [3] 58/7 67/25
82/24
extraordinarily [3] 10/6
10/13 64/12
extraordinary [1] 66/11
extreme [1] 55/9
extremely [2] 29/22 73/21
eye [1] 16/16
eyewitness [1] 88/10

F

fabricated [1] 41/8
face [1] 14/8
facing [4] 13/11 13/14 14/1
17/3
fact [21] 13/8 17/24 18/19
19/6 25/21 28/4 30/13 32/15
35/2 38/17 41/22 43/16
55/21 60/19 61/3 61/6 66/19
73/22 86/14 93/2 95/17
fact-intensive [1] 55/21
factors [5] 25/19 30/19
44/14 45/6 76/12
facts [10] 6/8 6/9 14/13
14/21 16/2 32/20 43/11 53/4
60/3 74/7

67/17 81/24
fair [10] 5/11 14/11 45/1
52/7 52/17 69/22 77/11
77/18 77/20 87/13
fairly [1] 54/11
faithful [1] 36/15
fall [1] 47/2
false [11] 5/4 11/2 24/3 24/5
24/9 24/10 27/24 28/8 37/16
37/20 40/19
familiar [1] 95/22
family [1] 88/16
far [6] 44/15 62/20 76/15
76/22 86/12 89/21
fashion [1] 69/17
fast [1] 72/3
favor [1] 29/8
favoring [1] 32/19
FBI [20] 30/21 43/15 50/6
50/11 50/16 50/21 50/22
50/22 51/24 52/5 54/18 60/6
66/20 86/4 86/5 86/10 87/18
90/20 91/14 92/1
FBI's [2] 60/10 87/21
FCRR [1] 3/15
fear [1] 35/18
February [5] 41/23 46/23
69/8 76/15 85/5
fed [1] 73/12
federal [4] 16/6 28/15 55/19
82/6
feed [2] 72/6 72/8
feedback [1] 69/8
feel [1] 47/2
feeling [1] 18/22
FERTITTA [4] 2/19 2/20
24/17 28/24
few [9] 13/21 18/10 19/12
20/24 32/4 45/17 48/14 73/6
82/20
field [2] 40/17 60/4
Fifth [4] 38/7 67/12 67/17
81/24
Fifth Circuit [4] 38/7 67/12
fight [5] 12/18 78/20 78/21
78/21 78/22
fights [2] 93/7 93/8
figure [1] 35/7
figured [1] 85/19
figures [1] 16/3
file [10] 9/16 12/18 33/21
44/23 60/11 77/16 77/16
91/13 92/8 92/11
filed [20] 4/6 4/19 25/9
27/14 28/24 30/24 33/12
33/13 33/15 51/2 62/18 67/5
67/8 68/16 68/17 68/18 74/1
90/14 91/12 95/24
files [6] 21/15 22/2 23/2
25/2 59/7 60/10
filng [1] 63/17
filings [2] 43/4 51/2
fill [1] 26/5
final [5] 30/7 66/9 95/9 96/2
96/4
financial [5] 51/3 51/4
51/22 51/24 52/11
find [9] 19/13 20/8 26/5
27/2 58/1 58/4 87/7 87/9
92/1
finding [3] 6/13 40/10 67/8
finding -- findings [1]
40/10
findings [1] 40/10
fine [6] 17/6 50/11 57/5
77/18 80/20 91/3
fingers [1] 85/12
finished [1] 15/13
FINRA [9] 64/8 64/10
64/11 64/13 64/24 75/15
76/25 84/16 85/9
fire [1] 35/1
Firm [5] 2/3 2/6 2/17 2/20
3/6
first [19] 10/15 11/3 11/6
15/12 18/10 39/12 40/15
43/19 51/20 54/22 59/10
68/7 68/10 68/12 68/13
68/17 72/16 72/25 81/12
five [6] 7/22 9/24 15/13
18/20 20/2 70/18
five-month [1] 15/13
flattering [1] 86/23
flavor [1] 10/24
flaws [1] 11/12
flesh [2] 12/25 13/18
fleshing [1] 78/24
flexible [1] 81/25
floor [3] 1/23 2/14 81/16
fluctuations [1] 76/11
focus [3] 10/15 10/18 54/16
focused [2] 24/7 92/14
follow [3] 4/5 41/25 45/24
follow-on [2] 41/25 45/24
followed [2] 72/11 72/12
followers [4] 25/24 26/1
26/3 26/11
following [1] 48/13
followings [1] 26/9
follows [3] 86/8 91/18 91/20
fool [1] 7/20
footnote [1] 16/4
forced [2] 22/18 23/13
forces [1] 32/16
forcing [1] 28/17
FORD [5] 1/19 1/20 1/23
64/24 86/9
foregoing [1] 96/19
forensic [2] 21/18 21/20
forfeitable [1] 91/7
forgot [1] 72/22
form [2] 51/22 51/24
former [2] 28/14 42/1
forth [1] 71/3
foul [1] 37/20
found [4] 18/20 32/1 43/22
43/23
foundational [1] 37/2
four [8] 13/2 13/3 53/24
54/17 70/18 75/24 80/15
93/12

four-letter [1] 70/18
France [1] 88/3
Franklin [1] 2/14
frankly [6] 39/9 55/1 77/23
79/24 80/13 92/16
fraud [11] 11/3 11/9 40/18
67/15 73/16 73/16 73/17
73/17 75/18 83/21 91/10
freedom [1] 5/9
Friday [1] 79/7
front [3] 31/13 45/22 46/19
fruit [1] 39/10
fruition [1] 16/21
full [1] 35/15
full-time [1] 35/15
fundamental [1] 85/1
future [2] 7/7 8/25

G

gain [1] 32/7
game [8] 15/12 52/7 52/17
73/23 77/11 77/18 77/20
87/13
GameStop [4] 42/6 42/12
57/8 57/17
gap [1] 26/1
gaps [1] 26/6
Garibotti [2] 11/10 71/17
Garibotti's [1] 73/12
Gary [3] 24/17 42/3 46/18
gave [3] 48/5 86/16 87/17
Gee [1] 82/25
general [3] 31/20 38/25
47/24
generally [1] 79/16
Gensler [2] 42/3 46/18
gentlemen [1] 45/3
germane [1] 18/4
gets [4] 61/5 64/14 79/8
79/19
getting [4] 34/22 64/2 74/13
78/9
Giglio [1] 60/19

Gilmore's [1] 81/12
girlfriend [2] 88/5 89/14
give [11] 13/8 14/14 17/2
26/20 27/4 49/1 58/18 65/22
65/23 87/20 93/14
given [11] 14/9 14/13 14/24
16/19 18/6 26/19 36/6 36/16
60/14 78/9 84/15
giving [3] 36/9 57/24 80/15
glossed [1] 55/8
go -- I [1] 86/16
go -- to [1] 10/23
goes [9] 11/6 30/25 39/1
47/15 50/21 51/12 73/19
73/20 87/10
going [127]
going -- I'll [1] 47/4
gold [1] 87/20
Goldman [1] 8/1
gone [2] 16/7 36/12
good [13] 14/6 19/10 24/16
31/12 32/8 32/10 32/15
32/15 35/23 38/12 46/24
54/2 77/21
got [28] 6/13 14/23 18/11
20/1 23/11 23/23 26/13
34/18 35/14 44/18 44/19
48/3 49/24 50/4 57/10 57/16
60/19 64/17 67/13 68/22
75/2 76/4 81/14 87/6 88/5
88/6 89/14 93/16
gotten [5] 64/11 64/11
65/13 65/19 65/24
government [89] 4/17 4/25
5/25 10/14 10/19 13/10
14/17 15/5 15/11 17/10
17/24 21/6 21/9 21/19 21/23
22/7 22/10 23/12 23/16
23/18 24/9 27/21 27/23 28/5
28/7 28/17 28/20 31/6 31/25
33/2 33/2 33/7 33/15 33/23
33/25 34/11 34/24 35/4
35/22 41/8 41/9 43/12 43/20
44/20 45/2 46/23 48/16 50/2

50/4 52/1 53/12 53/15 62/17
62/19 63/1 63/4 64/8 64/10
65/14 65/20 66/6 66/12 67/6
67/7 67/9 67/11 67/21 70/23
75/11 75/22 76/2 76/4 77/7
79/20 81/7 82/11 83/20 84/9
86/3 86/18 87/20 87/22
88/20 91/5 91/9 94/15 94/20
95/2 95/8

government -- from [1] 21/6

government -- the [1] 50/4

government's [44] 6/11 6/19 6/20 6/23 7/17 10/1 11/11 11/15 12/5 12/17 14/9 16/9 17/10 18/9 19/19 19/24 20/17 20/24 21/7 22/25 23/7 23/11 25/8 25/12 26/7 26/10 26/23 27/8 27/9 27/19 27/25 30/15 31/17 41/4 42/19 50/5 51/2 51/12 59/3 63/2 70/8 70/21 71/5 80/19

government's -- we're [1] 10/1

grab [1] 20/1

grabbed [1] 37/13

grabs [1] 20/2

grand [3] 47/14 47/15 50/17

grant [3] 61/10 78/23 86/20

granting [4] 61/9 61/10 69/1 88/24

gravamen [2] 14/18 39/4

great [7] 7/10 7/14 35/8 48/11 72/6 81/18 91/23

greatly [1] 15/17

grew [1] 79/20

ground [1] 11/23

grouped [1] 4/8

guarantee [1] 84/22

guess [4] 9/2 18/24 68/9 86/25

guilty [2] 73/16 73/17

guru [1] 38/23

guy [2] 38/12 64/21

guys [12] 6/7 31/2 31/3 43/1
44/6 44/21 48/22 63/15
75/17 76/11 91/15 92/8
GX1 [1] 73/1

H

H-O-F-V [1] 46/14
Hale [3] 60/5 60/5 60/9
half [7] 8/6 20/20 36/11
44/24 71/23 71/24 83/16
HALPIN [1] 1/19
hand [5] 19/5 82/22 87/16
87/17 92/4
handed [3] 14/16 17/8
53/14
handful [2] 42/16 82/19
handle [1] 63/24
handling [1] 24/19
hands [1] 31/6
HANEN [1] 1/8
hanging [4] 4/22 88/3 88/4
89/13
happen [8] 26/3 42/7 42/8
57/13 61/3 70/8 77/9 91/23
happened [6] 10/5 29/12
46/23 77/20 87/24 91/25
happening [2] 87/9 88/11
happens [1] 18/24
happy [2] 9/16 37/24
hard [7] 15/16 24/22 26/2
45/16 74/2 85/23 91/17
hard-pressed [1] 45/16
HARLAN [1] 2/9
harm [1] 31/4
harmed [1] 72/18
hash [1] 81/20
hasn't [1] 24/2
haste [3] 33/6 33/11 33/23
hastily [1] 12/24
hate [5] 79/20 80/10 80/11
80/12 93/12
hates [2] 81/15 93/10
have [246]

haven't make [1] 32/18
have -- they [1] 9/9
haven't [13] 13/19 31/5
36/12 36/13 57/23 61/13
64/11 65/4 65/19 67/3 74/19
78/8 93/23
haven't -- you [1] 57/23
having [8] 29/17 50/11
52/19 55/5 76/25 77/17
81/10 91/16
he [83] 4/7 4/21 11/7 11/9
11/9 12/13 18/21 19/4 19/4
19/4 19/5 21/10 24/2 24/9
24/10 25/10 25/11 25/24
25/24 25/25 28/13 31/21
32/3 32/5 32/6 32/13 32/14
32/17 32/19 32/23 32/24
33/4 34/23 35/1 35/5 35/10
40/13 42/16 42/16 42/17
44/16 45/18 45/18 45/22
46/19 47/23 47/24 48/11
48/11 48/12 48/13 48/14
51/23 51/23 51/23 53/21
53/22 59/9 59/12 60/9 60/12
60/14 60/19 62/16 62/18
63/7 63/7 72/13 72/14 72/14
72/15 83/6 83/7 86/19 87/17
87/17 87/23 88/17 88/17
90/9 90/19 90/23 94/3
he's [16] 11/4 11/6 12/12
18/20 18/22 18/24 18/25
32/2 32/7 32/9 41/16 60/20
62/16 67/8 88/1 90/20
head [4] 8/17 71/16 73/6
86/6
headed [1] 24/13
hear [13] 4/17 5/16 30/16
37/23 40/16 57/3 57/23
57/24 59/10 65/6 74/11
84/14 85/9
heard [6] 29/2 29/5 36/21
39/14 87/22 92/4
hearing [11] 1/8 36/17
36/18 41/24 46/5 46/17
48/10 56/25 81/18 91/17
93/21
hearings [2] 93/5 93/15
hearsay [1] 37/5
Heather [2] 3/15 96/23
Heights [3] 2/6 2/17 2/20
held [1] 45/19
help [4] 78/22 81/7 84/5
84/6
helpful [3] 33/20 33/25 79/3
helping [1] 85/12
helps [1] 89/1
HENNESSEY [6] 3/8 4/19
4/20 5/7 5/12 49/15
Hennessey's [4] 12/4 33/10
68/7 69/1
her [4] 11/12 11/12 38/20
49/1
her -- the [1] 11/12
Herculean [2] 17/22 27/13
here [39] 4/3 10/1 10/21
12/21 13/14 13/24 14/20
17/9 24/19 31/13 36/1 36/14
37/22 39/6 40/11 40/25 41/1
42/9 42/12 44/19 47/16 50/1
55/2 57/20 64/7 64/18 67/19
69/12 70/18 77/13 77/24
78/4 79/10 81/23 83/14
85/20 86/7 87/9 92/2
here -- yeah -- both [1]
67/19
here's [13] 10/3 24/25 41/10
41/11 56/23 61/8 70/20 77/8
77/8 79/12 91/12 91/13
91/14
here's -- here's [1] 77/8
herself [1] 11/11
hesitation [1] 16/15
hey [3] 41/10 75/16 87/23
HEYWARD [1] 1/15
high [2] 8/16 40/3
higher [2] 25/18 32/5
highlighted [1] 23/23
highly [1] 40/6

HILDER [2] 2/9 2/10
him [12] 4/8 4/22 15/1
32/11 32/16 33/21 60/18
72/13 83/14 86/19 90/21
94/13
his [33] 4/7 4/20 4/24 5/9
14/22 14/24 14/25 15/19
16/4 16/8 17/3 17/12 18/22
18/23 28/25 32/13 32/18
32/24 35/9 35/18 36/24
36/25 40/13 52/20 60/15
60/22 86/4 88/10 88/17 90/4
91/6 91/9 94/4
his -- he [1] 4/7
historically [1] 40/17
history [1] 16/19
hit [1] 11/4
hoe [1] 74/3
hold [5] 21/11 72/15 73/22
91/19 93/4
holding [3] 7/5 34/3 34/5
holds [1] 67/13
hole [1] 61/5
holidays [1] 16/21
home [1] 32/18
Honor [110]
Honor's [4] 16/8 65/6 84/15
85/24
HONORABLE [1] 1/8
hook [1] 37/2
hope [1] 48/25
hopes [1] 89/1
hoping [1] 85/4
horse [1] 16/25
hour [4] 16/23 32/8 34/21
77/13
hours [6] 6/25 17/20 17/20
18/18 25/6 25/7
hours' [2] 71/2 71/3
house [2] 63/11 88/22
houses [1] 87/25
HOUSTON [12] 1/2 1/17
2/7 2/11 2/18 2/21 2/24 3/4

3/7 3/10 3/17 60/4
how -- you [1] 92/25
however [3] 23/11 41/6
52/11
HOXIE [1] 1/22
Hoyt [1] 80/2
HRVATIN [11] 2/22 31/13
31/21 32/1 32/12 33/20
34/25 53/18 53/23 54/5 54/9
Hrvatin's [1] 54/2
huge [5] 11/16 12/7 14/8
27/11 45/19
hundred [3] 18/10 45/17
51/17
husband [1] 60/14
hyperbolic [1] 17/23

I

I -- as [1] 34/16
I -- I [4] 57/20 67/11 77/8
85/6
I -- I'll [2] 25/11 46/10
I -- I'm [2] 57/2 61/18
I -- it [1] 34/15
I -- it's -- it's [1] 86/4
I -- what [1] 80/4
I -- you [1] 10/11
I'd [4] 40/8 48/19 48/20
78/9
I'll [16] 4/18 10/4 25/11
25/11 29/1 35/15 40/12
46/10 47/4 64/25 79/24
89/15 92/12 93/3 93/4 95/22
I'm [121]
I'm -- I [2] 4/12 78/23
I'm -- I'm [3] 68/25 78/24
80/24
I'm -- there [1] 69/6
I've [29] 4/5 6/2 6/5 9/23
13/4 14/23 14/25 18/11 25/5
34/18 35/12 39/14 46/5 46/6
47/14 68/24 69/13 80/5
83/11 83/11 83/14 83/14
83/16 84/23 86/11 86/12
89/21 90/5 96/15

idea [3] 51/19 57/20 63/15
identical [1] 31/22
identified [2] 15/8 28/8
identify [1] 27/23
Ides [1] 81/19
III [1] 1/19
illegal [1] 50/13
illustrate [2] 17/13 18/12
illustration [1] 14/10
imagine [1] 70/10
immediately [1] 19/14
impact [1] 26/16
impactful [2] 19/6 80/22
importance [1] 76/18
important [21] 6/22 8/13
8/14 9/13 10/6 10/8 21/14
29/12 29/22 40/9 48/23 51/8
51/25 53/4 60/3 64/12 72/16
77/22 83/12 93/19 94/9
impossible [3] 47/22 47/22
84/24
impossible -- impossible [1]
47/22
imputing [1] 70/5
inappropriate [1] 66/16
incidents [1] 26/18
inclined [1] 85/10
include [4] 19/20 37/19
64/25 73/8
included [3] 14/18 20/4
26/7
includes [1] 90/18
including [2] 51/22 59/1
income [2] 35/9 35/9
inconsistent [4] 7/21 8/5 9/5
91/8
incorrect [2] 32/16 38/6
increases [2] 41/22 44/14
incredible [1] 14/12
incredibly [1] 20/14
inculpatory [3] 63/24 86/14
89/22
incumbent [1] 19/1
independently [1] 33/4

indeterminate [1] 41/22
indicate [1] 67/19
indicating [1] 87/5
indicative [1] 17/22
indicted [3] 5/5 18/21 44/6
indictment [24] 4/22 5/1
5/2 5/3 5/8 9/23 10/23 13/19
25/16 25/24 27/22 28/6 28/8
28/10 42/22 42/24 43/2 45/9
57/2 58/6 59/3 68/18 82/13
83/1
individual [4] 31/24 40/22
67/4 79/16
individuals [1] 69/17
information [21] 22/11
25/20 30/16 34/21 43/19
44/11 50/4 51/10 51/21
55/10 56/13 58/24 59/1 59/2
59/6 60/19 60/22 61/4 82/24
94/5 94/10
informs [1] 8/16
inside [3] 8/16 34/5 58/15
insider [2] 40/19 40/20
insiders [1] 64/20
instance [3] 22/13 63/6
63/10
instruments [1] 44/3
intangible [1] 67/14
integrity [1] 34/24
intelligent [1] 36/2
intelligently [1] 18/15
intensive [1] 55/21
intent [6] 7/9 7/12 8/11 9/12
63/16 73/20
interchanged [1] 23/24
interested [2] 32/13 89/12
interject [1] 58/19
interjection [1] 58/20
intermingled [1] 23/25
Internet [3] 6/14 37/5 37/14
intervals [1] 10/7
intervening [1] 39/1
interview [1] 33/21

interviews [1] 44/1
introduce [3] 36/23 55/6
74/5
invested [1] 50/16
investigate [2] 50/5 64/13
investigated [3] 44/13 44/24
51/11
investigation [12] 30/21
43/15 44/2 51/10 51/12
51/13 52/17 57/16 58/16
59/1 60/13 87/12
investigative [3] 50/5 50/9
51/5
investigatory [1] 44/23
investing [1] 6/15
investors [1] 7/25
involved [7] 24/8 26/8 29/3
43/15 47/25 60/16 64/19
involvement [1] 64/16
involves [1] 65/4
involving [2] 50/13 65/7
irreconcilable [1] 38/9
irrelevant [1] 36/19
IRS [5] 47/8 62/18 63/3
63/25 64/2
is -- does [1] 7/11
is -- I [2] 83/22 86/21
is -- is [1] 43/12
is -- trades [1] 33/4
is -- when [1] 21/19
isn't [4] 19/20 24/4 29/16
82/15
issue [48] 10/10 14/8 19/16
22/6 22/8 24/7 27/1 29/5
37/25 38/18 40/14 41/17
42/5 42/9 42/12 43/8 43/13
44/18 46/7 49/23 49/25
54/18 56/7 56/7 59/15 59/24
59/25 65/3 65/12 65/24 66/5
66/21 69/11 75/10 76/3 76/3
83/24 84/8 86/4 86/10 86/11
88/15 88/17 92/23 93/22
94/2 94/2 96/6
issued [4] 40/19 44/2 47/6

47/7
issues [35] 12/3 12/20 12/25
13/9 13/15 13/18 19/12
20/19 22/12 28/5 36/2 36/2
36/3 36/3 36/4 36/5 36/7
37/6 37/22 39/3 39/11 40/1
60/9 65/2 68/22 70/1 70/2
72/24 75/5 81/20 81/22 85/1
87/7 92/12 93/20
it -- I [1] 89/18
It'll [1] 93/14
it's -- I [2] 56/9 78/12
it's -- if [1] 52/5
it's -- it's [1] 12/15
it's -- that's [1] 79/10
It's -- yeah [1] 75/7
item [1] 33/14
its [8] 11/4 19/19 23/12 50/6
59/1 59/4 70/9 71/5
itself [2] 31/6 60/11

J

J-A-G-X [1] 46/13
Jackson [2] 3/9 3/12
JAGX [2] 42/6 46/13
jail [1] 87/23
JAMES [1] 3/12
JAMIE [2] 1/22 19/11
January [5] 42/14 42/14
46/23 51/3 53/22
January -- between [1]
42/14
January 25th [1] 53/22
January 31st [1] 51/3
Jencks [3] 28/13 95/6 96/1
Jenks [4] 66/14 95/10 95/14
95/17
Jenks-qualified [1] 66/14
jeopardy [2] 13/15 35/20
job [3] 8/2 11/11 20/14
JOHN [1] 1/12
joined [2] 28/24 30/11
joint [5] 30/20 43/15 67/9
79/5 81/5
jointly [2] 27/14 44/1

joking [1] 75/20
Journal [1] 57/14
judge [16] 1/9 5/18 7/4 8/21
14/14 58/14 66/9 67/18 80/2
80/2 81/2 81/12 84/20 92/3
92/20 96/8
judge -- thank [1] 14/14
Judge Gilmore's [1] 81/12
Judge Hoyt [1] 80/2
Judge Rosenthal [1] 80/2
judge-approved [1] 66/9
judicial [1] 16/2
juice [1] 53/25
July [2] 30/24 35/13
June [5] 5/4 27/23 34/3
37/21 83/4
June 5th [1] 34/3
jurisprudence [1] 17/5
juror's [1] 70/6
jurors [3] 79/16 79/18 80/6
jury [22] 6/9 10/24 19/2
29/16 30/16 31/7 31/16
31/18 45/22 47/15 48/17
69/24 69/24 73/18 75/3 79/5
79/6 79/10 80/7 80/9 80/22
93/10
jury's [1] 75/9
just [88] 10/18 11/4 11/19
12/9 13/2 13/8 13/19 13/21
14/7 15/23 17/14 19/12 20/4
25/11 28/21 28/25 29/12
29/14 32/5 33/24 34/19 36/1
36/18 36/21 36/23 36/25
37/3 38/13 40/13 41/15
45/14 49/22 53/3 53/3 53/20
54/14 54/14 54/21 56/20
57/12 59/9 60/17 61/18
61/19 62/10 62/13 64/6 65/5
65/12 65/19 65/20 65/21
65/24 65/25 69/10 70/4
71/12 71/15 71/22 73/11
74/12 77/5 77/14 78/24
80/12 80/22 83/7 83/13

83/22 84/8 84/25 86/16
86/17 87/2 87/6 87/19 89/2
89/15 89/19 90/18 90/24
91/25 92/4 92/5 92/8 94/1
95/1 96/9
just -- I'll [1] 25/11
Justice [2] 1/13 67/17

K

K-O-S-S [1] 46/14
keep [7] 50/11 69/21 69/25
74/8 75/9 80/15 93/6
kept [1] 78/5
key [1] 85/19
kick [1] 93/11
KIDD [1] 3/9
kids [1] 93/2
kind [13] 4/5 6/21 24/1 33/7
35/10 50/3 54/14 69/17 72/8
74/20 77/5 78/6 92/3
kindly [3] 16/4 31/25 33/15
knew [5] 24/4 24/6 35/16
52/15 72/13
know [123]
know -- it [1] 10/18
knowledge [2] 57/14 61/2
known [3] 14/25 72/14
83/11
knows [8] 15/15 36/23 37/4
77/16 93/16 93/18 93/20
93/20
Koss [1] 46/14
Kyles [2] 51/14 87/11

L

L.L.P [1] 2/23
lack [3] 34/24 51/10 71/16
Landy [2] 1/20 1/23
large [4] 23/3 37/6 52/13
81/11
largely [1] 14/19
last [7] 10/12 13/3 15/12
16/4 29/12 48/10 73/4
late [2] 33/19 92/24
later [6] 6/25 18/25 32/5

52/22 68/19 96/11
latter [1] 93/18
laundering [1] 91/7
laundry [1] 89/19
LAURA [4] 3/9 4/18 81/11
83/15
law [22] 2/3 2/6 2/17 2/20
3/3 3/6 35/11 35/20 38/6
38/6 38/24 50/22 60/19
66/16 67/12 67/13 86/5 87/8
87/18 88/16 95/11 95/25
laws [1] 18/4
lawyer [4] 18/2 18/3 18/5
86/11
lawyer's [1] 80/14
lawyers [9] 33/11 34/20
49/3 74/6 75/1 80/10 82/22
83/16 86/3
lay [2] 15/24 82/22
lead [4] 4/16 21/7 64/10
74/25
leading [1] 67/17
leads [2] 60/6 88/14
learn [5] 6/9 31/16 31/17
35/17 43/11
learning [1] 18/3
least [18] 9/4 19/14 21/4
22/20 30/4 32/21 34/12
43/25 44/12 49/6 52/12 53/6
53/6 64/23 83/16 87/15 88/6
89/21
leave [1] 89/15
leaving [1] 12/7
left [4] 22/11 36/14 56/10
70/12
legal [2] 61/7 74/3
length [5] 23/21 53/20 82/5
82/10 82/21
less [4] 8/13 8/13 29/12
41/19
let [23] 4/2 6/2 10/4 10/9
28/20 30/9 49/3 49/19 57/2
66/20 67/7 67/10 69/19
69/19 73/25 77/4 77/4 78/19

let... [5] 83/1 86/2 86/7 92/2
96/6
let's [15] 4/10 4/15 37/25
39/13 39/23 39/24 52/22
53/3 54/16 55/11 64/3 74/6
79/6 92/1 94/21
letter [3] 20/25 34/7 70/18
letters [1] 42/2
level [1] 8/22
LEWIS [5] 3/2 36/25 83/13
94/2 94/11
Lewis's [1] 25/22
lied [1] 6/16
life [2] 17/3 81/13
like [32] 11/4 11/15 11/17
11/22 11/23 12/2 12/11
13/16 13/19 17/17 19/12
19/25 22/6 34/18 38/14 40/8
48/20 48/20 52/13 53/21
61/24 63/21 64/1 64/20
65/17 65/17 77/24 81/14
81/19 84/1 89/13 90/21
like -- there's [1] 12/2
like -- they're [1] 65/17
limine [6] 11/1 11/15 12/2
45/25 61/1 84/1
limit [3] 32/9 85/10 85/18
limitation [1] 5/9
line [3] 20/8 22/21 48/21
lining [1] 19/17
LIOLOS [1] 1/12
list [16] 19/19 22/14 23/7
24/5 33/13 33/16 41/6 42/18
46/4 46/15 52/11 52/12
53/16 63/13 63/16 71/16
listed [5] 42/19 42/20 43/2
59/4 64/18
listen [1] 69/25
listened [1] 72/7
listening [1] 36/1
listens [1] 16/25
lists [5] 6/6 54/25 55/4 62/7
84/3

literal [1] 8/1
literally [3] 48/17 48/17
81/13
literally -- literally [1] 48/17
litigation [1] 35/17
little [10] 4/3 37/21 41/11
53/4 61/19 65/14 65/19
72/24 77/5 87/19
lived [1] 87/24
living [1] 32/18
LLP [5] 1/20 1/23 2/13 3/9
3/12
lock [2] 8/3 9/4
locked [1] 11/11
locking [1] 8/7
long [15] 7/25 13/25 35/2
69/11 71/4 71/10 75/3 75/25
76/23 78/7 80/5 83/11 85/12
88/17 90/17
long-term [1] 7/25
longer [3] 5/7 27/22 28/17
look [30] 8/23 11/16 11/17
11/22 12/11 14/22 16/5 19/3
21/20 22/1 22/13 22/18 24/8
26/21 34/12 47/23 48/10
48/12 48/17 48/22 68/22
70/6 75/17 77/19 79/9 79/13
83/8 87/15 91/22 96/6
looked [6] 13/2 41/21 62/21
69/13 70/24 72/6
looking [6] 12/9 16/15
58/23 70/1 75/2 75/25
looks [2] 22/6 52/13
losing [1] 67/14
loss [4] 31/24 44/22 67/14
83/24
losses [2] 40/24 41/3
lost [4] 41/13 55/1 64/1 72/7
lot [31] 4/4 5/24 8/23 12/20
13/18 16/8 18/3 26/9 26/25
27/2 27/10 29/2 35/25 36/17
37/6 39/9 42/8 52/3 53/2
53/4 56/4 64/11 71/13 72/1

74/15 75/23 77/2 79/1 79/11
79/11 83/17
Louisiana [1] 1/16
love [1] 13/20
Lovett [1] 2/11
Lu [1] 28/22
Lubbock [1] 15/14
lucky [1] 75/3
LUIS [2] 2/2 28/22
lumped [2] 24/1 24/2
lunch [1] 9/8
lying [1] 7/17

M

ma'am [1] 14/15
made [39] 14/7 15/3 15/6
15/19 18/21 19/4 19/19
20/17 27/7 29/24 31/1 32/7
35/8 41/3 41/18 42/13 42/15
42/16 42/17 42/17 45/2 45/3
45/5 45/18 45/22 46/10
50/17 52/3 56/4 73/15 75/17
77/1 78/5 86/18 86/18 86/19
87/17 88/19 94/5
Madison [1] 1/23
magistrate [1] 66/9
magistrate's [1] 35/14
mail [8] 21/6 21/9 34/10
66/7 66/13 90/18 95/9 95/13
mailed [1] 34/4
mails [7] 33/14 33/17 59/7
90/1 90/8 95/5 95/16
main [2] 72/12 73/2
maintain [1] 5/14
major [2] 43/8 93/4
majority [3] 19/24 45/4
45/5
make [31] 5/7 7/16 10/7
11/16 11/22 12/6 13/10
14/24 16/23 18/13 18/16
21/25 23/17 29/1 29/18 32/6
32/18 35/15 44/18 44/19
61/15 65/21 73/18 77/7
78/21 80/21 85/8 88/16
89/24 92/18 95/4

makes [7] 18/16 20/13
20/18 33/7 33/11 33/23
34/11
making [6] 6/13 12/11
27/22 31/23 56/25 71/18
MALLETT [3] 2/23 2/23
31/12
malpractice [1] 10/18
man [3] 17/2 54/8 57/9
manager [2] 14/3 16/5
manipulation [2] 64/13
64/20
manner [3] 43/8 73/21
80/17
many [11] 12/18 13/25
16/11 26/11 43/23 45/6 45/6
46/25 63/7 83/20 84/8
March [6] 15/13 37/18
42/15 81/19 84/2 92/25
March 1st [1] 42/15
margins [1] 35/3
MARIE [1] 3/9
marital [1] 87/9
market [16] 8/3 8/20 9/6
25/8 25/13 25/19 25/20 26/2
26/4 26/14 26/16 26/21
26/22 31/3 32/10 32/16
market -- these [1] 26/4
Massachusetts [1] 2/14
massive [4] 5/22 22/19
24/23 65/16
master [1] 17/23
match [1] 73/6
material [25] 21/1 23/10
26/7 28/13 30/9 30/12 34/7
37/3 40/5 40/9 49/2 50/2
51/14 51/19 51/20 52/1 53/6
56/8 58/14 58/15 59/11
59/12 87/24 94/8 95/7
materiality [1] 72/1
materials [7] 21/1 34/22
35/5 43/20 66/16 66/18
95/18

MATLOCK [5] 2/2 27/14
28/23 47/20 49/12
matter [6] 17/24 23/9 51/11
73/13 73/14 96/20
matters [2] 19/18 22/3
MATTHEW [1] 1/19
Maxine [2] 41/23 46/16
may [48] 5/18 6/7 14/4 14/5
19/8 19/9 26/8 30/14 31/10
31/11 32/16 34/15 35/4
46/12 53/12 55/20 55/20
57/25 58/19 62/13 63/22
63/23 64/2 64/2 69/18 80/1
81/3 82/1 82/2 82/15 82/16
84/2 84/6 84/12 84/18 85/2
85/2 85/3 85/3 85/7 91/24
92/25 93/1 93/2 93/14 93/15
93/19 93/21
may -- may [1] 64/2
maybe [10] 6/18 39/15
57/25 69/6 70/4 70/4 75/25
86/15 86/25 92/6
MCGUIRE [1] 2/10
McKinney [2] 3/6 3/10
me -- and [1] 6/6
me -- I [1] 86/2
me -- let [2] 69/19 77/4
mean [57] 4/10 4/11 4/16
6/8 6/16 6/21 6/22 12/5
12/15 13/15 13/18 19/23
21/18 32/15 57/3 58/12
63/14 63/25 64/2 67/12
69/15 69/21 70/5 70/7 70/16
70/20 71/3 71/4 71/11 71/14
72/8 73/15 74/3 74/5 74/20
75/1 75/2 77/9 77/10 78/3
78/15 78/19 78/23 79/10
79/24 80/11 83/22 86/15
86/17 86/21 89/10 89/18
91/22 91/23 92/5 93/7 93/9
Meaning [1] 19/22
means [3] 21/17 31/21
60/11
measure [1] 16/14

mechanical [1] 3/24
media [1] 36/8
meet [2] 13/10 33/11
megabytes [1] 65/17
Melley [1] 64/10
members [1] 25/10
meme [11] 41/11 41/21 42/5
42/18 44/8 45/6 45/19 46/3
46/16 54/20 58/25
Memorial [2] 2/24 83/9
memorialize [1] 90/20
memorialized [1] 90/1
memory [1] 67/18
mention [2] 30/7 77/4
mentioned [4] 45/9 70/17
81/4 95/1
merits [1] 77/22
message [7] 12/7 20/2 20/3
53/17 88/7 88/9 89/12
messages [9] 12/5 14/19
17/12 18/8 19/17 19/17 73/7
74/15 74/16
methodology [1] 73/11
MICHAEL [1] 3/12
microphone [4] 58/22 75/6
75/7 87/5
Microsoft [1] 8/14
mid [1] 5/4
mid-June [1] 5/4
middle [1] 70/14
might [3] 7/15 61/15 79/4
million [11] 11/3 41/18
41/20 42/14 42/15 42/20
45/3 45/3 45/15 45/22 48/3
millions [4] 20/6 20/6 48/17
48/18
mind [6] 46/22 55/4 69/21
74/8 80/15 93/6
mindful [1] 31/15
minute [9] 8/9 9/5 10/5 10/5
49/20 57/7 66/23 74/5 77/17
minutes [4] 7/22 18/18
18/24 32/4
misleading [2] 20/15 48/15

misled [1]	72/17	53/23 54/2 54/4 54/5 54/7 54/9 54/20 60/13 60/23 63/6 63/8 63/20 64/21 64/24 65/2 67/5 67/23 68/7 69/1 69/19 71/4 75/22 82/15 82/18 83/13 86/3 86/8 86/9 86/25 88/10 90/9 93/25 94/2 94/4 94/11 95/19
missed [3]	51/5 51/5 52/14	
missing [5]	6/7 25/12 26/23 39/25 65/7	
missing -- and [1]	6/7	
mistake [2]	33/15 33/17	
mistakes [1]	34/11	
Mitchell [1]	4/19	
mode [1]	82/7	
Mole [1]	10/2	
moment [1]	22/9	
money [21]	10/7 35/8 41/3 41/13 45/18 45/20 46/10 50/9 50/10 50/12 52/3 52/4 52/4 73/15 87/18 88/1 88/15 91/6 91/6 91/7 91/9	
monitor [1]	5/8	
month [15]	13/8 15/13 29/13 75/2 75/25 76/9 76/13 76/23 80/23 80/25 83/6 84/5 91/4 94/14 94/21	
months [14]	10/21 10/22 13/2 13/3 13/6 13/21 20/21 24/21 27/23 36/11 69/5 76/1 76/1 80/15	
months' [1]	13/25	
monumental [1]	15/5	
moon [1]	46/25	
more [13]	9/23 19/12 20/19 20/19 22/11 22/12 24/25 27/21 30/10 35/8 41/2 53/25 85/11	
morning [9]	6/24 12/9 14/6 16/5 19/10 24/16 31/12 35/23 36/21	
most [14]	7/18 13/4 17/4 32/17 33/25 38/8 38/15 39/16 39/16 40/8 80/6 84/25 85/19 93/19	
most -- you [1]	39/16	
motion [60]	1/8 4/13 4/14 4/19 10/12 12/4 24/17 28/6 28/24 30/11 30/18 30/24	

Mr. Rosen... [4] 18/17
23/22 36/22 75/22
Mr. Rosen's [1] 15/2
Mr. Rybarczyk [5] 4/6 5/21
49/13 82/15 82/18
Mr. Rybarczyk's [1] 45/12
Mr. Stefan [1] 31/13
Mr. Williams [3] 4/6 16/3
39/15
Mr. Williams' [1] 10/12
Mrs. [1] 15/9
Mrs. Epley [1] 15/9
MS [3] 1/22 2/10 3/9
Ms. [11] 27/16 37/15 38/2
40/7 47/5 48/24 68/9 69/4
71/17 73/12 86/9
Ms. Cordova [4] 27/16 38/2
68/9 69/4
Ms. Cordova's [1] 37/15
Ms. Garibotti [1] 71/17
Ms. Garibotti's [1] 73/12
Ms. Solano [3] 40/7 47/5
86/9
Ms. Solano's [1] 48/24
much [7] 6/8 15/24 19/18
73/15 86/12 86/16 86/16
mud [1] 45/15
multi [2] 26/13 76/13
multi-disciplined [1] 26/13
multi-month [1] 76/13
multiple [4] 4/13 31/22
63/15 63/17
multiples [1] 17/16
multiplied [1] 26/17
MURTHA [1] 3/12
must [1] 5/24
mutually [1] 38/10
my [78] 7/6 10/4 11/2 12/21
12/25 13/5 13/16 15/18 16/5
16/13 16/14 16/19 17/11
17/20 17/21 18/14 18/19
19/10 24/18 27/19 28/14
29/5 29/13 30/6 33/6 33/13

33/17 34/17 37/17 38/13
40/7 41/1 41/10 42/13 42/15
43/8 43/11 44/12 44/15 45/2
45/5 45/15 46/4 46/10 47/12
47/23 50/13 50/20 50/22
52/19 56/10 56/10 64/18
64/25 66/11 67/2 67/18
69/21 71/16 72/7 72/16 73/6
75/22 78/16 79/11 80/5 81/7
81/13 81/15 82/9 82/16 84/7
84/7 84/9 84/15 87/14 88/1
88/15
My -- I [1] 7/6
myself [1] 15/11

N

N-A-K-D [1] 46/13
nailed [1] 7/3
NAKD [4] 42/6 42/13 42/16
46/10
name [4] 19/10 41/1 50/21
78/16
naming [1] 46/9
narrow [3] 10/22 13/23
72/23
Nasdaq [1] 25/17
Nasdaq.com [2] 25/17
25/21
national [1] 60/8
nationwide [1] 13/4
nature [2] 18/2 76/2
NEAL [2] 2/16 2/17
near [1] 75/7
nearly [2] 52/4 84/24
necessarily [3] 4/12 78/12
89/20
necessary [2] 14/21 21/16
need [37] 7/2 7/2 12/25
13/13 13/18 13/21 14/12
17/17 21/22 21/25 24/24
24/24 30/4 30/5 30/17 30/22
30/25 31/6 31/7 34/12 35/17
44/23 45/25 51/21 53/11
74/9 76/9 78/21 81/25 82/21
84/3 84/18 85/8 89/11 89/16

89/19 93/3
need -- we [1] 21/22
needs [4] 24/15 32/21 56/8
84/9
negotiating [1] 80/1
neighborhood [1] 72/2
never [7] 9/23 9/23 17/3
28/7 32/12 34/11 57/23
new [7] 1/13 1/24 1/24
19/11 22/10 22/11 92/23
newspaper [1] 40/25
next [3] 47/5 48/14 84/15
nice [1] 4/8
night [3] 10/12 13/3 73/4
night's [1] 16/4
nine [1] 36/15
ninth [1] 81/16
no [39] 1/4 8/12 8/13 16/15
16/17 16/20 17/17 18/5 39/8
39/8 39/17 40/24 40/24 41/2
41/19 42/13 43/9 43/13
43/13 44/22 44/22 49/10
49/12 49/13 49/14 49/15
49/16 51/19 55/11 57/20
60/19 70/6 72/22 73/9 76/10
78/18 82/21 95/5 95/5
No. [4] 31/20 33/14 34/15
51/2
No. 22 [1] 34/15
No. 346 [1] 51/2
No. 383 [1] 31/20
No. 388 [1] 33/14
nobody [3] 41/3 41/3 46/24
Nods [1] 86/6
none [5] 16/6 16/13 28/10
45/7 70/5
norm [1] 13/7
normal [4] 25/6 25/7 36/6
90/21
normally [3] 38/9 79/15
87/19
not [168]
not -- I'm [2] 17/23 23/21
not -- in [1] 7/8

not -- you're [1] 92/6
note [2] 21/11 96/10
nothing [5] 10/21 11/7
44/15 76/11 90/5
notice [2] 77/6 83/6
noticed [1] 21/12
notion [1] 26/8
novel [1] 17/4
now [44] 8/23 14/1 20/7
21/4 21/17 23/5 23/13 23/14
23/17 24/7 24/11 26/9 33/6
33/7 34/10 34/19 36/18 39/7
42/2 43/5 45/4 45/14 46/4
47/9 52/10 52/20 55/23 57/4
57/25 63/22 65/3 66/11 74/2
76/13 77/17 79/12 79/24
80/15 86/23 87/14 87/25
92/2 92/17 94/2
number [8] 12/16 15/8 39/3
42/20 69/21 69/23 82/4
82/11
numbered [1] 34/15
numbers [2] 34/16 61/16
numerous [1] 94/6
NW [1] 1/13

O

O'Brien [3] 1/20 1/23 30/9
o'clock [1] 6/23
o0o [1] 96/18
object [2] 49/7 96/10
objection [7] 18/14 49/10
49/12 49/13 49/14 49/15
49/16
obligation [1] 56/14
observation [1] 84/7
obtain [3] 63/14 63/17
67/20
obtained [6] 21/2 21/19
43/24 43/25 50/7 50/12
obviously [17] 6/22 10/17
11/7 49/8 55/3 55/5 63/20
69/22 77/11 80/18 80/19

86/20 86/22 87/8 87/25
90/17 94/8
occasioned [1] 16/11
occasions [1] 20/10
occurred [1] 44/9
October [9] 4/21 5/15 5/17
13/6 16/18 18/7 28/12 29/7
78/9
October 23 [1] 29/7
October 23rd [2] 5/15 5/17
odd [3] 64/18 65/19 83/2
off [12] 4/16 7/15 7/21 8/6
10/7 15/9 17/12 36/14 60/18
73/6 74/25 77/5
offenses [1] 60/24
offer [3] 58/7 72/25 73/3
office [4] 1/16 16/5 60/4
81/3
official [2] 3/16 25/17
often [3] 31/15 31/23 64/14
oftentimes [1] 75/25
oh [9] 10/3 10/14 10/18
36/13 36/14 39/8 42/11
70/13 83/10
old [1] 92/25
omitted [1] 71/2
once [4] 44/10 80/7 80/8
85/23
one [92] 5/16 5/23 9/22 9/25
10/2 10/3 11/2 11/10 11/19
12/9 12/10 12/10 12/10
12/17 12/22 13/4 14/24
15/16 15/18 16/13 17/4
17/15 20/5 20/23 21/5 21/6
22/5 22/5 25/10 29/18 30/3
32/8 32/21 33/19 36/7 38/11
40/8 40/18 41/8 43/6 44/22
47/4 47/23 48/15 49/18 50/6
51/9 51/14 52/19 54/14
54/20 56/20 57/12 57/13
60/2 64/17 65/12 65/24 67/3
68/10 68/11 68/12 68/15
68/15 69/10 69/21 69/23
70/6 70/11 70/12 74/6 74/7

76/3 77/4 77/6 79/2 80/2
81/6 82/4 85/6 87/7 87/9
87/11 87/16 88/12 90/9 92/4
92/16 93/21 94/1 95/23 96/9
one -- one [1] 12/10
one -- that's [1] 22/5
one's [3] 39/8 39/8 54/22
ones [1] 43/10
online [1] 9/17
only [12] 10/14 10/15 13/15
22/18 23/13 32/17 32/21
55/9 65/14 65/23 82/25
84/15
ons [1] 46/7
open [4] 22/24 56/5 86/24
91/18
opened [1] 59/1
opening [1] 43/18
opinion [3] 8/5 18/22 59/4
opinions [1] 7/7
opportunity [1] 76/10
oppose [2] 33/16 33/23
opposed [2] 13/25 67/5
opposition [1] 33/9
option [1] 44/22
orchestrate [1] 81/17
order [15] 4/7 7/8 9/2 25/2
26/20 44/8 49/4 49/8 56/18
64/25 78/10 84/15 92/24
93/13 93/22
ordered [5] 41/24 56/15
64/7 64/9 64/24
ordering [9] 49/5 56/16
58/1 58/2 58/4 59/8 59/13
61/13 79/3
orders [8] 8/23 8/24 9/9
9/15 9/15 11/16 11/22 32/9
organized [1] 46/17
original [1] 21/15
other [42] 5/10 6/21 8/21
12/20 12/21 13/1 13/13
31/19 32/16 34/20 35/11
35/12 35/12 38/12 43/10
44/16 45/24 47/1 47/3 47/20

other... [22] 48/21 49/2
53/21 55/19 61/2 61/5 61/19
62/6 62/23 65/12 68/16
68/22 69/2 73/4 76/3 76/12
76/16 79/18 81/19 86/17
87/17 96/9
others [6] 32/24 35/8 35/9
53/18 67/20 84/10
otherwise [5] 13/11 59/6
63/25 73/7 74/15
our [61] 5/6 7/11 8/10 11/11
11/14 16/1 19/14 20/7 20/14
22/20 24/8 24/11 24/15
25/10 27/10 28/3 28/3 28/8
28/10 28/14 30/2 30/3 30/20
31/2 31/3 31/6 31/19 37/9
37/10 37/19 40/9 43/19 47/8
47/21 48/3 53/16 54/24 55/9
56/13 61/22 61/24 62/15
63/12 68/19 76/15 76/16
76/22 81/3 82/16 83/23
85/10 85/12 85/25 89/24
90/3 90/8 90/10 90/11 90/15
90/23 90/24
our -- our [1] 28/3
ourselves [2] 19/13 62/23
out [54] 5/7 8/25 9/3 9/8
10/4 11/1 11/14 12/2 12/4
12/7 12/25 13/14 13/19
13/23 15/3 16/22 17/7 17/15
22/25 27/10 31/5 31/22
32/10 32/19 33/24 34/4 44/5
47/15 50/9 58/1 58/4 60/3
63/23 63/23 67/11 68/18
70/12 70/17 73/22 78/24
79/9 80/7 81/20 83/23 84/5
85/19 87/7 87/9 88/3 88/4
88/5 89/14 92/1 93/11
outside [4] 16/8 44/15 49/9
79/18
outstanding [3] 39/16 40/4
88/15
over [28] 4/22 5/23 14/25

21/13 24/21 26/9 39/13
42/15 42/16 42/17 42/17
43/25 44/24 46/6 47/5 48/3
48/4 48/14 55/9 57/10 64/15
73/9 80/13 80/13 81/15
81/21 86/3 93/7
overnight [1] 34/4
overruled [1] 96/15
overwhelming [2] 45/4 45/4
owes [2] 56/1 94/20
own [13] 15/19 17/11 27/10
32/24 37/11 37/11 37/14
38/14 50/6 56/22 59/7 60/10
62/25

P

P.C [1] 2/10
p.m [5] 7/14 7/15 66/25
66/25 96/17
pace [1] 18/6
page [4] 13/22 53/24 54/7
58/4
page 2 [1] 54/7
pages [2] 46/6 48/4
paid [1] 34/20
pain [2] 89/1 91/24
panel [1] 79/19
paper [7] 14/23 18/11 45/21
52/16 65/15 65/20 66/1
papers [1] 10/14
paragraph [1] 34/17
parse [2] 87/2 87/6
part [14] 7/1 18/25 24/19
41/19 51/4 52/13 55/10
55/20 57/11 61/17 69/11
70/9 73/8 90/14
parte [1] 89/3
particular [4] 32/14 32/20
33/13 34/8
particularly [2] 8/15 91/5
parties [3] 25/5 59/2 81/8
partly [1] 56/24
partnership [2] 32/23 35/11
party [8] 23/1 23/1 70/7
70/7 89/24 90/4 91/3 91/4

password [4] 25/1 25/2
34/10 34/14
past [3] 44/24 61/19 79/6
paying [1] 34/21
peak [1] 11/4
penalize [1] 80/14
penalty [1] 15/13
pending [7] 16/6 30/9 32/25
33/22 68/6 68/23 94/25
people [13] 4/23 9/7 9/8
35/11 41/12 57/10 69/14
75/14 78/20 79/17 84/2 84/5
89/13
per [1] 82/20
percent [3] 7/6 11/5 32/7
percentage [1] 26/9
peremptories [1] 81/8
perhaps [1] 24/25
period [7] 19/13 25/15
32/20 35/7 50/7 50/8 50/8
period -- that [1] 50/7
permission [1] 14/10
Perry [1] 28/22
person [8] 12/22 15/16
69/18 77/13 93/18 93/19
93/19 95/12
personal [1] 57/14
perspective [2] 16/12 75/10
pertains [1] 50/3
pertinent [1] 93/23
Peter [1] 64/10
pettiness [1] 82/8
phenomenon [2] 44/9 45/20
PHILIP [2] 1/12 2/9
phone [4] 17/11 17/13
33/21 43/19
phones [1] 59/7
phonetic [1] 64/21
pick [2] 8/15 69/23
picked [6] 24/8 48/6 70/11
70/12 77/18 80/8
piece [1] 15/20
pieces [2] 15/2 41/8
piling [1] 83/22

PJ [1] 47/20
place [4] 27/1 39/12 67/8
72/17
PLAINTIFF [1] 1/11
plan [6] 43/5 43/7 45/25
55/6 93/13 93/16
platform [1] 27/1
platforms [1] 8/22
play [1] 10/1
plea [1] 69/2
pleading [1] 16/4
pleadings [1] 56/22
Please [1] 9/18
pledge [1] 16/19
plenty [1] 10/23
plow [1] 78/14
plowed [1] 78/13
plugged [1] 53/9
plus [1] 20/12
pocket [2] 56/10 56/10
point [22] 10/13 11/1 11/14
12/2 14/7 14/24 17/7 22/9
25/20 30/7 31/2 37/15 45/12
50/1 61/20 63/5 67/11 72/1
72/12 72/21 73/11 74/8
point -- if [1] 30/7
pointed [2] 12/4 83/23
points [3] 13/14 26/4 26/22
pool [1] 44/7
portion [2] 7/21 49/6
portions [1] 12/7
position [16] 4/23 5/6 7/15
7/21 8/6 20/15 28/11 30/20
32/6 45/8 62/20 66/11 76/22
85/16 85/17 95/8
positions [2] 87/16 91/8
positive [1] 8/5
possession [15] 44/11 46/4
47/8 48/3 54/24 55/3 55/9
55/16 55/17 56/8 56/13
61/23 61/23 63/2 94/4
possibilities [1] 61/6
possible [4] 33/12 35/16

36/22 75/9
post [1] 83/25
posted [2] 25/16 25/25
posting [1] 25/23
postings [1] 32/13
posts [3] 26/25 27/1 36/8
pot [1] 39/6
potential [1] 51/16
potentially [7] 26/16 60/25
61/1 64/19 65/7 76/8 94/9
pour [1] 48/5
pouring [1] 15/10
practical [2] 74/4 74/12
practitioner [1] 34/19
preadmit [1] 93/6
precedent [1] 81/24
precluded [1] 45/25
predict [1] 8/24
prefer [1] 75/8
preferred [1] 69/5
prejudice [3] 38/8 38/9
38/15
prejudices [1] 28/3
prejudicial [1] 10/25
preliminary [1] 20/10
preparation [2] 14/8 15/5
prepare [2] 14/12 64/3
prepared [6] 5/13 9/14 19/1
36/5 58/25 96/7
preparing [1] 52/14
presence [1] 79/18
present [5] 19/2 49/4 79/1
80/16 81/7
presentation [5] 40/13 73/5
73/8 80/4 82/7
presented [3] 17/25 76/10
94/3
presenting [1] 43/12
presents [1] 82/11
press [3] 36/25 37/13 44/5
pressed [1] 45/16
pressuring [1] 47/17
pretrial [2] 14/8 81/18
pretty [2] 32/8 61/5
presented [1] 14/1
price [16] 8/2 8/6 8/25
11/20 32/5 32/10 40/19
40/23 41/12 41/12 41/22
44/14 44/21 57/7 76/10
76/11
prices [1] 8/10
primarily [6] 4/16 42/15
47/12 47/20 60/8 76/25
prior [1] 19/14
prioritizing [1] 76/17
privacy [1] 49/23
privately [1] 79/17
probably [9] 69/6 71/19
71/22 73/7 78/8 78/10 92/24
93/4 93/14
problem [10] 17/20 21/21
21/22 22/5 23/8 23/15 24/19
45/14 56/23 61/12
problematic [2] 21/5 64/3
procedures [1] 82/6
proceed [1] 5/12
proceedings [4] 3/24 4/1
96/17 96/20
process [7] 5/12 15/17
21/16 25/7 35/20 71/17 82/3
processing [2] 22/7 25/5
processor [2] 23/1 23/1
produce [12] 5/1 9/16 28/12
56/8 58/2 58/16 59/13 61/13
64/9 64/14 64/24 66/7
produced [15] 3/25 21/23
23/16 33/2 37/21 39/5 50/19
54/23 59/21 61/12 61/24
65/21 66/19 94/10 94/14
produces [1] 33/25
producible [1] 95/10
producing [8] 20/25 22/7
36/8 37/16 37/19 51/21
66/15 95/2
production [17] 20/18
20/23 20/25 21/5 21/24 25/8
25/13 26/10 26/23 27/8 27/9
27/19 34/15 36/12 43/20

production... [2] 61/17
 95/18
productions [11] 20/17
 20/19 22/10 22/25 23/2
 23/14 24/21 25/1 26/18
 34/18 64/11
profit [5] 31/23 32/4 35/2
 44/22 73/12
profitable [1] 73/21
profited [1] 35/6
profiting [1] 35/2
profits [5] 8/7 9/4 40/24
 50/7 50/11
program [1] 5/25
promise [1] 89/21
promptly [1] 33/12
promulgated [1] 16/1
proof [3] 43/5 43/6 85/10
proper [3] 18/13 27/20
 28/15
properly [1] 16/17
property [2] 67/14 88/20
proportional [1] 82/11
proposed [1] 14/9
proposing [1] 63/12
prosecute [2] 9/21 75/11
prosecuted [1] 4/25
prosecution [5] 55/10 55/13
 55/19 55/20 66/14
prosecutions [1] 17/4
prosecutor [2] 21/7 28/15
prosecutors [2] 47/16 52/19
prospective [1] 80/6
protect [1] 80/18
protected [1] 25/1
protective [2] 49/8 60/10
protracted [1] 35/17
prove [3] 71/25 75/22 83/21
proven [1] 32/16
provide [7] 5/3 29/6 32/1
 34/12 62/23 63/7 63/19
provided [6] 34/8 34/9
 34/24 52/5 52/7 90/25

public [1] 6/15
pulled [1] 23/24
pulling [1] 17/12
pump [10] 9/22 10/2 10/3
 11/7 12/11 12/13 18/1 40/15
 64/21 75/24
pumped [1] 6/14
purchase [1] 18/23
purely [1] 71/6
purported [1] 29/15
purportedly [2] 12/11
 27/24
push [2] 5/6 76/24
put [30] 5/25 9/9 10/16
 13/15 15/6 16/4 16/12 16/14
 16/22 17/17 17/21 20/3 22/8
 23/12 24/11 30/19 30/19
 41/9 44/4 52/1 52/15 53/5
 54/24 60/10 63/16 69/18
 70/9 71/5 87/7 92/16
puts [1] 35/10
puts -- rebuts [1] 35/10

Q
qualified [1] 66/14
quantities [1] 8/2
quarters [1] 71/19
quasi [1] 64/8
quasi-government [1] 64/8
QUENTIN [1] 2/9
question [10] 7/16 58/10
 71/6 71/7 71/22 71/22 77/10
 80/13 82/22 95/11
questionable [1] 53/5
questioning [3] 79/13 82/7
 83/18
questionnaire [4] 79/5 79/7
 79/12 81/5
questions [7] 17/6 49/2
 79/17 82/1 82/14 82/16
 82/17
quibble [1] 85/25
quick [1] 14/25
quicker [1] 61/15
quickly [3] 9/10 61/5 75/9

quote [8] 30/3 39/9 55/1
 77/23 79/3 79/24 80/13
 92/15
quote [1] 21/10

R
rabbit [1] 61/4
raise [5] 12/21 13/9 13/20
 65/24 94/2
raised [5] 10/10 13/20 51/7
 64/24 94/2
ran [1] 33/24
Ranch [1] 1/20
random [1] 36/23
randomly [1] 5/8
rapid [1] 35/1
rapid-fire [1] 35/1
rarely [1] 53/25
rather [1] 96/11
reached [1] 8/7
reacting [1] 9/5
read [6] 8/4 46/5 57/13 59/9
 59/12 95/11
Reading [6] 53/24 54/2 54/4
 54/5 54/7 54/9
ready [17] 4/17 4/24 4/24
 5/11 16/23 18/6 19/15 20/22
 28/1 38/3 38/5 38/5 39/2
 39/8 39/9 76/20 78/9
real [14] 12/3 12/6 17/11
 17/12 25/8 25/13 25/19
 25/20 25/20 26/4 29/6 54/12
 77/9 82/1
real-time [1] 54/12
realistic [1] 85/4
realistically [4] 69/15 69/19
 70/8 71/3
realize [2] 71/11 71/11
really [19] 8/18 12/15 15/21
 17/21 23/9 29/4 30/25 33/9
 44/17 60/21 76/3 78/25 80/4
 82/19 84/5 87/25 88/12
 93/12 93/17
really -- these [1] 12/15
reams [2] 14/23 18/11

requested [2] 34/9 36/10
requesting [1] 43/19
requests [3] 4/14 32/25 94/6
required [1] 47/7
requiring [1] 48/16
research [3] 22/12 26/20
26/21
reservation [1] 16/24
reserve [1] 10/16
reserving [1] 10/20
resolved [2] 36/5 93/8
resolves [1] 65/1
resources [1] 27/7
respect [1] 83/17
respectfully [1] 91/7
respectively [1] 13/22
respond [13] 28/20 35/22
35/25 67/7 67/7 67/10 67/11
67/23 68/5 74/1 83/24 91/15
91/22
responds [1] 67/22
response [12] 33/8 34/8
54/2 62/10 72/22 87/22 90/8
90/15 91/22 91/24 92/12
94/7
responsible [1] 9/21
restitution [1] 83/25
result [2] 21/2 91/10
results [1] 21/13
retained [1] 34/20
returned [1] 50/10
returns [1] 64/1
reveals [1] 48/13
review [3] 8/18 29/23 66/17
REYES [3] 2/2 28/22 28/22
Rhonda [3] 14/14 53/8 79/8
rid [4] 4/10 4/11 4/12 49/22
Ridge [1] 79/21
right [64] 4/2 4/4 6/4 10/16
12/12 13/1 13/11 17/10 20/7
28/4 29/25 31/14 34/11
36/17 39/13 43/3 48/6 48/9
48/13 49/17 50/24 52/4
55/23 56/10 57/4 59/15

right... [38] 59/23 59/25
64/5 65/1 66/3 66/22 67/1
67/2 67/8 67/18 68/4 68/14
68/18 70/23 73/25 74/2
74/24 77/7 79/24 80/9 80/24
82/6 83/7 84/11 85/9 86/5
88/24 90/18 90/18 90/20
92/17 92/19 92/23 93/22
94/2 94/13 95/19 96/15
rights [5] 4/20 10/20 28/16
35/19 38/21
rises [1] 69/18
risk [1] 54/4
RMR [1] 3/15
road [5] 1/20 13/12 13/17
49/24 89/16
rob [2] 54/9 87/19
ROBERT [1] 1/19
robust [2] 16/13 81/18
Roman [1] 81/20
roof [3] 57/8 57/17 70/15
room [7] 4/11 29/16 53/18
55/14 81/24 82/12 83/16
room's [1] 81/6
ROSEN [8] 2/13 5/20 14/7
16/3 18/17 23/22 36/22
75/22
Rosen's [1] 15/2
Rosenthal [1] 80/2
Ross [1] 3/13
round [1] 32/3
row [3] 74/2 78/13 78/14
Ruby [1] 79/20
rule [6] 38/25 63/13 63/17
67/21 82/6 96/7
ruled [1] 67/3
rules [3] 44/6 44/8 82/6
ruling [3] 65/6 85/25 96/14
rulings [1] 84/2
run [2] 21/18 61/5
running [2] 71/12 71/15
rush [1] 12/24
Rusk [1] 3/16

RYBARCZYK [8] 2/8/4/6
5/21 49/13 67/5 74/1 82/15
82/18
Rybarczyk's [2] 33/10
45/12

S

S-N-D-L [1] 46/13
Sachs [1] 8/1
said [45] 6/16 6/24 7/5 7/22
9/5 10/14 10/18 10/19 14/13
14/14 15/4 15/7 15/21 17/1
17/17 18/11 18/17 24/2
27/19 36/13 40/13 41/10
41/15 42/7 43/4 48/10 48/11
48/11 50/13 51/23 51/23
61/9 64/1 72/21 75/23 77/6
77/7 77/17 77/17 84/1 85/8
87/12 88/14 88/21 89/3
said -- Rhonda [1] 14/14
sale [2] 7/14 7/16
sales [1] 40/20
same [22] 5/10 6/9 13/22
17/12 24/25 31/16 31/18
31/23 32/2 32/3 32/5 44/3
44/5 47/14 47/15 54/9 58/3
64/9 72/15 78/14 80/12 92/1
Samesies [1] 54/2
SAMUEL [1] 2/13
Saper [1] 2/23
sat [1] 37/17
saw [3] 16/1 37/3 46/25
say [48] 6/23 7/4 7/6 7/17
8/5 10/15 11/4 11/20 13/14
23/18 24/9 24/10 27/12
34/11 37/5 38/23 40/3 41/10
44/20 45/2 45/22 46/10
48/22 53/6 53/6 55/12 56/9
57/6 58/14 60/21 67/16 70/9
72/9 72/10 72/12 74/6 75/16
76/10 76/20 77/14 77/15
77/18 78/4 78/16 79/6 82/25
84/20 91/8
say -- and [1] 70/9
say -- to [1] 8/5

saying [30] 4/17 6/6 7/10
7/18 7/18 12/10 12/12 18/15
20/25 31/21 37/7 38/13
38/20 40/12 44/6 56/12
56/24 56/24 57/2 62/16 66/6
66/12 70/11 79/11 87/17
87/17 91/6 91/13 95/13
95/15

says [13] 17/10 21/10 23/18
33/14 38/3 38/12 54/4 54/5
54/7 54/9 57/16 58/15 79/19

scenes [1] 74/18

schedule [2] 17/5 38/14

scheduling [4] 69/10 76/19
84/14 92/24

scheme [1] 41/19

Schwab [1] 8/1

SCOTT [2] 1/12 35/24

scoured [1] 46/6

screen [2] 20/1 20/2

search [4] 21/2 43/25 66/8
95/25

seat [1] 39/24

seated [2] 4/2 67/1

SEC [40] 30/13 30/18 30/21
42/1 42/2 42/3 42/7 43/14
43/16 43/19 43/20 43/21
44/1 44/2 44/4 44/13 45/5
46/2 46/18 46/21 47/1 54/18
55/7 56/13 56/20 57/11
57/16 58/10 58/11 58/18
58/25 59/2 61/9 64/7 64/9
64/14 64/22 76/25 84/16
85/9

SEC -- if [1] 57/11

SEC's [4] 40/10 44/11
44/23 58/24

second [7] 10/5 10/5 29/24
40/9 52/18 68/9 68/15

secondary [1] 60/7

seconds [2] 18/19 19/5

securities [6] 18/2 18/4
40/17 40/18 41/20 75/14

security [1] 60/8

sequence [2] 10/6 11/16
serious [1] 5/9
serves [1] 67/18
set [4] 68/9 85/11 91/12
92/24
setting [6] 4/11 4/12 39/14
67/4 78/10 82/2
seven [8] 24/21 26/17 30/19
48/21 71/11 81/13 82/21
83/10
sever [5] 4/13 4/19 38/2
69/1 69/2
several [6] 20/10 20/17
34/17 47/20 75/25 80/5
several-month-long [1]
75/25
severance [5] 5/14 33/11
37/25 38/13 38/16
shared [1] 31/25
shares [2] 11/20 25/18
sharing [1] 34/19
she [13] 11/13 35/5 38/6
41/23 46/17 52/13 52/14
52/15 71/17 81/14 88/3 88/6
89/15
she's [2] 38/3 38/20
Shepherd [1] 3/3
shift [1] 39/13
shirt [1] 72/7
shit [1] 54/3
shocked [3] 16/5 40/12
40/14
shoehorn [1] 61/6
short [4] 44/8 70/20 80/21
82/13
shot [1] 38/12
shots [1] 39/7
should [15] 17/6 28/2 39/12
45/9 45/11 45/13 45/21
45/24 46/1 66/19 77/23 79/2
81/10 81/18 87/23
shouldn't [1] 23/16
show [15] 10/4 11/12 12/1
15/22 18/8 32/14 33/4 38/8

44/11 45/16 60/23 74/16
74/17 74/17 74/20
showing [1] 68/6
shown [1] 14/25
sic [5] 10/23 13/16 15/22
30/10 89/14
side [2] 80/22 92/3
sides [1] 80/20
sideshow [1] 36/18
sign [2] 27/6 64/4
Signature [1] 96/23
signed [2] 66/9 66/10
significance [2] 18/8 76/17
significant [3] 7/12 7/19
38/15
similar [1] 14/23
simple [2] 17/25 19/3
simply [5] 7/6 7/10 11/2
13/19 17/2
simultaneously [1] 91/5
SINA [3] 3/5 3/6 94/12
since [6] 4/22 10/10 15/24
46/23 69/12 78/23
single [3] 20/5 29/18 36/7
sister [3] 60/15 87/18 87/21
sit [3] 10/1 39/6 78/19
sitting [6] 11/23 31/13 36/1
55/13 57/20 94/8
situation [2] 24/4 51/19
six [6] 7/11 27/23 69/5 69/5
81/13 83/7
Sixth [3] 13/1 28/16 29/4
skin [1] 73/23
slid [1] 83/7
slowed [1] 15/17
small [7] 8/2 10/7 31/23
31/23 32/4 35/3 35/7
smearing [1] 41/1
so -- these [1] 47/21
so-called [1] 41/7
social [1] 36/8
SOLANO [5] 1/22 19/11
40/7 47/5 86/9
Solano's [1] 48/24

sold [6] 6/14 18/24 32/2
32/5 48/12 53/24
solo [1] 34/19
solution [1] 28/5
some [47] 6/5 7/15 9/4 9/14
9/14 10/25 12/11 15/6 18/3
20/6 21/12 21/12 22/19
22/24 23/2 23/10 23/15 25/3
25/12 29/11 35/10 36/21
37/2 47/12 49/1 54/14 57/25
63/5 64/11 67/4 69/8 69/14
73/1 74/9 77/9 81/2 81/3
81/8 81/20 84/16 86/11
86/19 86/21 87/25 88/6 92/6
93/2
somebody [8] 70/17 78/4
78/5 78/13 79/19 88/1 93/16
93/17
somebody's [1] 78/13
somehow [4] 31/3 31/3
60/22 81/17
Someone [1] 9/2
something [13] 6/25 28/3
29/11 34/1 34/1 46/21 64/2
67/14 67/20 77/23 89/3
90/21 92/8
sometime [1] 84/2
sometimes [8] 11/20 24/1
25/4 32/3 37/16 64/15 69/16
78/15
somewhat [1] 57/24
soon [2] 34/9 88/4
sorry [7] 36/10 58/21 65/5
75/6 87/4 90/3 91/16
sort [5] 5/23 82/8 87/16
88/16 89/11
Sotto [1] 14/3
sounds [1] 89/12
source [2] 48/2 53/6
sources [1] 26/5
South [2] 1/20 3/3
SOUTHERN [1] 1/1
speak [7] 14/21 32/22 33/19

40/8 40/8 62/13 87/4
speaking [1] 41/5
special [1] 51/22
specific [4] 18/3 19/13 25/9
40/18
specifically [2] 25/14 75/14
speculation [1] 57/25
speed [4] 15/11 15/17 85/12
93/9
speedily [1] 79/8
speedy [6] 4/20 27/25 28/3
38/18 38/20 38/22
spell [1] 46/12
spend [1] 17/20
spending [1] 88/5
spliced [1] 12/6
spreadsheets [3] 34/23
48/19 65/16
spring [4] 93/1 93/2 93/4
93/4
squarely [3] 13/7 51/9
73/19
stab [1] 81/19
staffing [1] 93/16
stance [1] 76/5
stand [7] 45/2 52/8 74/6
78/16 85/7 90/10 90/10
standing [1] 10/9
standpoint [6] 24/20 70/21
70/22 74/4 74/4 74/12
staring [1] 9/7
start [9] 4/15 4/18 31/20
40/12 53/3 69/19 71/4 79/12
93/7
started [1] 81/15
starts [2] 33/6 53/23
state [2] 32/14 34/17
stated [1] 30/13
statement [11] 15/2 18/22
19/4 66/14 87/11 95/4 95/10
95/12 96/2 96/4 96/5
statements [25] 5/4 14/19
15/7 15/18 17/15 24/6 27/24
28/8 29/23 29/24 36/23
37/11 37/14 37/16 37/20
40/19 61/25 61/25 65/15
65/20 66/5 66/19 72/18 95/1
95/3
STATES [12] 1/1 1/4 1/9
1/13 1/16 46/22 55/15 55/16
55/25 56/7 57/10 71/7
station [1] 60/4
statistics [1] 16/1
status [1] 60/10
steal [1] 87/20
Stefan [1] 31/13
stenography [1] 3/24
step [1] 20/11
STEPHANIE [1] 2/10
STEPHEN [1] 1/19
steps [2] 36/6 60/17
Stewart [1] 67/18
stick [1] 57/9
still [4] 28/6 53/10 68/6
81/15
stock [37] 6/14 7/7 7/10
7/14 8/2 8/6 8/10 8/12 11/3
11/4 11/5 11/5 18/22 25/14
31/22 32/2 32/4 32/5 32/13
32/15 35/1 40/20 41/10 44/8
45/19 46/9 46/16 48/11
48/14 53/21 58/25 59/4
64/17 70/14 70/14 72/6
72/16
stocks [35] 7/18 8/15 30/15
32/19 36/24 40/10 40/23
41/20 41/21 42/6 42/16
42/18 43/7 43/9 43/9 44/13
45/6 45/9 45/18 46/2 46/3
46/18 46/25 54/20 57/1 58/6
58/7 64/18 82/11 82/13
82/14 82/15 82/19 83/20
84/8
stood [3] 42/7 46/19 48/10
stop [1] 6/2
stopped [3] 5/23 35/12
35/13
stories [1] 72/11

sufficiently [1] 82/2
suggest [2] 41/9 62/8
suggested [1] 4/7
suggestion [4] 4/5 60/16
81/2 85/6
suggestions [1] 84/7
suggests [1] 51/3
Suite [10] 1/16 1/20 2/3 2/6
2/17 2/24 3/6 3/10 3/13 3/16
summaries [6] 23/13 37/7
37/10 37/10 47/6 48/16
summary [13] 20/3 20/4
20/5 22/14 22/14 22/18
23/20 23/22 75/12 75/17
77/10 77/10 81/21
sun [1] 69/18
Sundial [3] 42/6 42/16
46/13
superseding [2] 25/16
68/18
supervision [1] 64/8
support [1] 15/19
supporting [1] 88/17
supposed [4] 22/16 27/24
27/25 43/23
suppression [1] 22/8
Supreme [4] 38/7 38/24
67/13 67/16
sure [16] 7/3 13/10 16/23
18/13 22/1 23/18 29/18
54/19 62/14 65/21 72/10
80/1 85/14 85/16 89/24
92/18
surrounding [1] 51/10
sweet [2] 70/20 80/21
synthesized [2] 23/10 24/5

T

tackle [1] 10/3
tagged [1] 94/11
tailor [1] 84/3
taint [1] 79/19
take [30] 7/23 25/4 26/14
26/19 29/15 34/12 37/25
39/6 48/21 52/22 65/9 66/12

66/15 66/20 66/22 69/12
71/5 71/10 76/4 77/1 77/13
78/25 79/1 84/25 84/25 85/5
86/19 91/21 91/21 94/25
taken [7] 15/3 26/25 36/6
66/6 66/25 83/11 95/8
takes [3] 26/16 27/10 29/19
taking [5] 17/14 31/23
35/12 36/21 76/22
talk [15] 18/14 30/10 39/13
39/23 39/24 44/17 45/23
64/19 69/12 71/17 74/25
77/22 86/15 86/24 94/13
talked [5] 29/13 29/22 43/9
81/4 93/23
talking [16] 18/17 18/18
20/12 29/23 40/11 40/22
41/1 43/7 46/19 61/19 69/15
71/6 76/13 86/25 90/23
92/15
talks [1] 87/10
tally [1] 29/8
target [1] 8/7
task [5] 9/20 17/22 23/19
27/11 27/13
TATE [1] 2/9
tax [7] 47/6 47/8 48/9 49/5
49/5 64/1 83/3
tax -- your [1] 49/5
TD [8] 47/13 47/16 47/17
47/19 77/24 77/24 78/1 78/2
TD -- what [1] 77/24
tea [1] 57/7
team [15] 19/15 20/7 22/20
24/15 25/6 25/10 50/5 51/5
55/10 55/13 55/13 55/19
55/20 76/16 82/16
teams [1] 76/16
technical [1] 41/2
technicalities [1] 29/3
technology [1] 34/21
tee [2] 13/9 36/7
tell [14] 7/2 15/9 16/23 18/4
40/1 57/4 61/16 62/20 66/22

tell... [5]	72/8 74/21 79/24 83/10 95/3	37/11 77/23 86/22 91/6 91/23 93/14	37/21 37/24 37/24 40/8 40/24 41/9 45/13 45/19
telling [10]	6/15 16/16 45/18 55/23 61/11 72/15 74/2 89/19 90/2 91/3	that -- their [1] 30/18 that -- those [1] 92/12 that -- what [1] 29/13 that's [81] 7/18 8/9 8/9 9/13 10/7 10/17 10/23 11/5 14/20	46/10 47/17 48/21 49/6 49/7 49/20 52/9 55/3 55/5 55/6 56/4 58/13 61/14 61/16 62/5 62/16 62/17 62/19 62/23
tells [2]	32/12 41/6	17/2 18/25 21/21 22/5 22/5 23/19 25/20 26/1 26/3 27/24	62/23 63/2 63/7 63/7 63/9 63/11 63/11 63/13 63/16
ten [10]	9/24 13/6 32/7 36/14 43/1 67/23 68/4 81/11 91/21 91/22	28/4 28/15 32/8 33/15 33/17 37/5 38/12 40/6 40/21 41/11 41/14 41/17 44/22 45/20	63/17 63/22 65/22 69/10 70/13 74/17 75/15 78/4 79/7 79/8 79/17 83/17 83/18
tend [3]	75/4 75/8 76/7	47/11 48/23 51/8 52/23 53/16 54/14 54/21 55/8 56/6	87/20 93/11 93/11 94/21 95/4
tens [2]	48/17 48/18	57/4 57/11 59/12 59/15 61/4 61/12 63/12 63/24 64/17	themselves [3] 14/21 50/20 73/22
terabyte [1]	5/23	66/11 67/20 68/14 69/22 74/2 74/20 76/22 77/1 77/11	then [48] 6/14 6/24 10/15 11/6 18/24 19/4 20/3 20/8
term [3]	7/25 40/15 40/21	77/20 79/10 79/11 80/20 80/20 81/23 81/23 82/9	21/22 22/19 23/7 25/4 29/24
terms [1]	29/14	82/12 82/12 82/19 84/22 86/5 87/12 88/23 89/10	29/25 32/4 34/24 35/18
testified [2]	42/2 42/3	91/23 92/17 94/8 96/3 96/5 that's -- that's [2] 81/23	40/20 40/25 42/2 43/6 45/14
testify [3]	28/14 72/5 77/1	82/12 their [61] 6/12 8/1 8/17 9/7	47/4 47/18 48/12 48/14 52/7
testifying [10]	21/1 21/7 21/9 28/13 52/8 60/20 65/7 66/7 66/13 95/14	10/14 14/17 14/18 17/18 18/13 21/1 21/6 24/22 26/11	55/19 56/17 56/19 59/24
testimony [7]	46/5 46/7 77/14 86/21 86/22 88/11 95/8	28/4 28/13 28/17 30/11 30/18 31/2 34/2 34/16 35/5	64/19 68/11 68/18 71/21
TEXAS [15]	1/1 1/17 1/21 2/4 2/7 2/11 2/18 2/21 2/24 3/4 3/7 3/10 3/13 3/17 60/4	37/10 37/11 41/14 42/20 43/4 43/22 43/23 44/3 46/11	71/23 71/25 73/3 79/16
text [16]	12/5 12/6 17/12 18/8 19/16 19/17 20/2 20/2 21/15 22/2 53/17 73/6 74/15 88/7 88/9 89/12	51/3 52/8 52/11 52/12 54/25 55/3 55/4 56/21 61/2 61/23	79/21 81/14 82/13 84/5
texts [1]	17/21	62/7 70/14 73/20 75/11 76/24 78/3 80/7 80/8 80/8	87/22 88/7 89/14 91/14
than [12]	6/8 9/23 29/13 32/5 41/2 41/19 43/10 43/12 46/20 79/11 84/21 96/11	80/10 81/8 81/9 82/23 83/18 84/3 84/3 88/9 91/23 95/7	91/25
thank [15]	14/14 19/7 27/15 28/21 35/23 49/25 65/11 78/19 92/19 92/20 92/21 94/19 94/22 96/8 96/16	95/12 their -- is [1] 95/12	then-acting [1] 42/2
thanks [2]	54/8 82/25	them [72] 4/8 9/14 9/17	theories [2] 17/4 39/11
Thanksgiving [1]	16/22	10/16 12/19 13/9 16/6 19/24	there -- I [2] 37/22 59/17
that [621]		21/5 23/4 23/4 27/7 28/17	there -- if [1] 49/4
that -- and [4]	6/21 68/10 75/20 89/11	30/22 30/22 33/3 33/3 33/21	there'll [1] 11/20
that -- that [8]	25/15 29/21		there's [43] 11/2 11/17

therefore [8] 5/14 35/20
39/2 44/22 60/18 66/17
72/18 95/10
these [107]
these -- these [1] 42/5
they [160]
they -- if [1] 61/13
they -- the [1] 23/25
they -- they [2] 23/19 70/13
they -- what [1] 43/4
they'll [4] 10/2 45/16 72/10
83/24
they're [50] 4/16 4/17 5/2
5/2 8/16 10/6 10/19 10/20
11/2 11/23 11/23 12/7 17/19
18/10 20/25 25/6 37/7 38/23
39/10 39/25 41/14 42/22
48/1 55/4 57/6 57/15 57/18
62/7 63/2 65/17 65/17 71/14
73/16 73/17 75/13 75/15
75/16 76/5 76/7 76/9 76/24
80/7 80/9 80/9 80/11 80/12
82/17 87/16 87/17 94/8
they've [12] 10/21 11/19
11/21 12/5 13/14 19/25 20/3
23/23 27/19 43/4 43/22 50/8
thing [15] 8/21 11/3 12/10
13/13 74/21 76/4 77/4 79/2
80/9 82/8 88/14 89/11 92/1
92/16 96/9
things [25] 4/4 4/7 20/22
21/4 22/11 27/8 29/1 29/12
30/4 33/12 39/5 42/8 48/9
53/5 61/15 64/13 81/3 81/4
81/4 84/24 87/7 88/8 90/18
92/3 93/9
think [105]
think -- I [1] 76/23
thinking [4] 61/5 74/2 75/1
79/23
thinks [1] 91/9
third [13] 23/1 23/1 25/4
48/24 49/1 49/17 59/2 59/24

86/2 86/23 90/4 91/2 91/2
third-party [2] 23/1 23/1
this [237]
this -- because [1] 52/1
this -- the [1] 6/11
this -- this [1] 9/10
This -- what [1] 58/23
this -- your [1] 58/15
THOMAS [2] 1/15 67/17
thoroughly [1] 83/13
those [48] 8/24 10/19 18/8
18/9 23/2 23/16 24/11 24/14
24/15 24/18 29/18 29/25
32/20 39/17 42/9 42/19 43/5
43/9 45/24 48/23 52/10
52/21 59/12 61/12 61/17
62/11 62/22 64/9 65/1 65/21
66/18 67/21 67/23 72/3 73/8
73/11 74/1 74/15 84/2 84/7
86/11 89/25 90/4 91/8 92/12
93/8 95/2 95/18
though [8] 5/5 31/20 42/10
42/23 43/5 50/12 55/12
85/20
thought [8] 4/8 24/12 24/12
72/6 72/23 73/4 78/8 84/21
thought -- where [1] 24/12
thousand [4] 11/20 20/12
45/17 51/18
thousands [3] 25/2 40/25
46/6
three [13] 29/14 35/7 40/4
46/22 49/20 54/16 71/19
74/14 75/24 76/1 79/9 80/15
93/11
three -- the [1] 74/14
three-quarters [1] 71/19
three-year [1] 35/7
through [30] 9/14 11/10
11/25 12/16 15/10 15/17
17/8 21/16 23/14 29/17 30/5
45/15 46/6 52/12 57/8 57/17
66/24 69/25 70/15 71/12
71/15 73/1 74/7 74/14 75/13
77/15 87/3 87/6 88/7 89/10
throughout [2] 43/21 44/9
throws [1] 9/2
thumb [3] 34/6 34/8 34/10
Thursday [1] 79/7
ticker [1] 25/14
tickers [3] 46/9 59/4 83/1
tied [3] 77/22 83/19 84/8
ties [1] 39/25
till [2] 27/23 39/22
time [63] 5/10 6/9 7/13 7/13
10/6 12/14 13/20 13/21
14/12 16/22 17/12 19/13
20/18 22/1 22/10 24/24
24/24 25/22 25/24 26/14
26/15 26/17 27/10 27/21
29/20 30/1 30/5 31/16 31/18
32/17 32/20 33/24 34/25
35/7 35/15 35/21 39/2 50/7
50/8 50/8 50/12 54/12 54/13
67/6 67/10 72/15 75/1 77/2
78/6 79/13 79/14 80/10
81/25 82/8 83/12 83/18
83/24 84/9 87/25 88/5 88/18
91/17 93/10
time-wise [1] 75/1
times [5] 26/17 31/22 32/3
32/7 93/12
timestamp [1] 23/15
timestamps [8] 12/22 21/12
21/14 21/21 21/23 21/25
29/21 34/23
timing [3] 22/3 22/4 78/10
title [1] 25/17
titling [1] 33/8
today [11] 4/5 17/5 25/18
40/11 44/19 46/1 53/18
56/25 57/20 92/4 94/25
together [16] 4/8 5/25 15/20
16/14 17/18 17/21 20/3
28/18 30/19 30/19 38/23
38/25 39/1 48/22 79/4 88/5
told [2] 17/22 39/7
tolled [1] 39/2

tons [1] 37/22	13/4 14/1 14/9 14/18 15/13 16/7 18/2 18/5 18/9 18/13 18/19 19/14 19/15 20/22 27/25 28/4 28/12 30/23 30/25 35/18 35/18 36/4 36/10 36/11 36/16 36/19 36/20 38/3 38/18 38/21 38/22 39/1 39/14 39/22 39/25 41/2 41/16 45/16 67/4 69/5 69/22 73/3 73/5 73/8 75/25 77/22 78/10 81/15 82/5 82/10 82/13 82/21 83/3 85/11 87/14 93/7	Twitter [15] 12/22 21/16 21/19 22/2 25/24 25/25 26/2 26/8 26/11 26/15 32/13 43/24 72/6 72/8 72/13 two [36] 6/25 9/22 11/19 16/7 17/15 20/20 21/4 36/11 38/11 39/14 40/14 44/23 44/24 47/3 47/24 48/16 50/3 60/6 64/1 67/24 69/7 69/7 71/2 71/3 71/9 71/21 75/20 75/24 76/1 79/9 87/7 87/7 87/15 89/13 92/12 93/3 two -- I [1] 69/7 type [2] 12/12 40/18 typical [1] 19/25 typically [2] 7/5 9/22
too [1] 22/23		U
took [4] 26/25 27/1 60/17 81/12		U.S [3] 16/1 62/17 62/19
tool [2] 21/18 21/20		UK [1] 12/22
top [2] 53/24 73/6		ultimate [1] 73/12
Torchlight [1] 25/18		ultimately [1] 23/9
totally [1] 74/11		Um [1] 52/25
town [2] 88/3 89/15		uncharged [2] 72/20 74/8
track [1] 77/5		under [11] 5/7 24/14 27/22 27/25 37/12 47/2 51/13 60/18 64/8 82/6 95/10
trade [8] 8/8 43/24 48/4 48/22 65/13 65/16 65/21 73/21		underbrush [1] 54/15
trade -- the [1] 65/16		underground [1] 57/9
traded [5] 25/25 34/25 43/9 43/11 53/21		underlying [11] 19/20 20/1 20/13 22/2 22/15 22/15 23/12 27/4 30/15 31/1 58/24
trader [4] 8/23 31/21 32/18 63/6		underscore [1] 74/12
traders [2] 8/1 8/15		understand [16] 6/19 7/1 20/21 29/18 56/2 56/6 59/17 61/11 69/16 70/1 76/16 76/17 85/24 89/3 96/13 96/14
trades [14] 6/22 8/3 22/3 23/22 26/15 26/15 28/9 31/22 31/24 33/4 37/11 48/18 65/16 71/2		understandably [1] 5/11
TradeZero [1] 47/19		understanding [1] 89/24
trading [35] 5/24 6/20 8/4 8/22 10/4 11/18 19/3 20/1 25/15 26/18 29/25 32/19 32/24 32/25 35/2 36/8 44/7 48/2 50/6 50/11 53/20 54/12 54/17 54/23 59/14 59/18 59/18 61/10 61/20 61/25 61/25 62/1 62/9 65/23 77/25		understatement [1] 27/12
traditional [1] 64/21		Understood [2] 37/9 85/21
transcript [2] 3/24 96/19		unfair [1] 78/12
transfer [4] 50/15 51/5 61/6 87/8		unflattering [1] 89/4
transpired [1] 88/7		unheard [1] 36/12
travels [1] 64/15		
TRCH [3] 25/14 25/23 25/25		
trial [70] 4/11 4/12 4/20 4/21 4/24 4/25 5/9 5/10 5/13 5/15 5/17 10/1 10/24 12/24		

unique [2] 36/1 36/3
UNITED [12] 1/1 1/4 1/9
1/13 1/16 46/22 55/15 55/16
55/25 56/7 57/10 71/7
United States [7] 46/22
55/15 55/16 55/25 56/7
57/10 71/7
universe [3] 72/22 73/2
73/9
unless [2] 10/22 56/15
unopposed [1] 33/21
unpack [5] 4/2 53/2 75/19
75/21 77/3
unprepared [1] 80/12
until [6] 5/4 20/20 39/2 51/6
60/13 68/24
untoward [1] 37/21
up [50] 6/14 9/2 9/9 11/5
13/9 15/11 15/16 19/17 20/9
20/20 20/22 21/11 22/21
23/6 24/8 34/5 36/7 40/20
40/21 41/12 42/7 44/17
44/21 45/2 45/16 45/17
46/24 47/18 48/10 48/22
52/8 52/22 54/21 55/12 65/9
66/20 72/1 73/6 74/6 77/13
78/16 79/19 79/20 80/22
81/6 86/7 93/9 93/10 94/25
95/23
upon [2] 14/7 19/1
upset [1] 88/6
us [18] 8/18 10/17 19/1
22/11 22/11 22/20 26/19
27/4 32/1 34/1 43/16 51/21
58/4 58/9 63/5 65/13 90/25
94/10
use [6] 16/21 16/21 26/5
32/9 43/5 80/2
used [10] 9/21 17/13 40/17
47/12 47/13 47/20 61/1 63/7
63/15 70/4
using [1] 57/12
usually [5] 11/18 65/22

80/13 83/4 83/18
UUU [1] 64/17
V
vacation [1] 83/4
value [1] 67/20
variables [1] 76/12
variance [1] 35/9
various [1] 67/5
various -- Mr. Rybarczyk
[1] 67/5
version [2] 66/10 66/10
versus [1] 55/15
very [32] 5/24 10/7 10/7
13/8 14/7 16/13 17/24 19/6
21/4 25/9 27/10 29/6 29/11
29/11 30/11 31/2 31/23 35/9
39/5 39/5 39/10 41/23 43/11
47/4 48/25 55/21 76/3 82/1
86/22 88/6 89/15 94/1
victim's [1] 72/9
victims [3] 43/23 71/25 72/3
video [1] 44/5
view [3] 7/11 23/3 87/11
viewable [1] 60/11
violate [1] 28/16
violated [1] 38/21
violating [1] 34/2
violation [3] 5/12 35/11
41/2
visit [1] 86/2
voce [1] 14/3
voir [3] 79/4 79/15 84/4
volatility [2] 8/12 8/15
volume [10] 8/13 12/16
15/23 15/25 16/15 24/23
24/25 29/25 30/15 41/22
voluminous [1] 20/7
vote [3] 5/16 29/8 76/15
VS [1] 1/5
W
W-E-B-U-L-L [1] 47/11
Waco [1] 79/21
wait [7] 23/6 28/17 55/11
55/11 55/11 57/6 67/21
waited [1] 27/23
walk [3] 17/8 21/16 76/19
Walker [2] 3/9 3/12
wall [2] 57/14 60/18
Wall Street [1] 57/14
want [46] 4/4 17/18 21/11
21/11 28/19 29/1 29/15
31/17 31/20 36/13 38/5
38/13 40/1 61/8 69/8 69/12
69/22 77/9 77/12 77/14
77/21 78/6 78/13 78/25 79/4
79/22 79/22 80/4 80/14
80/18 81/1 85/17 85/18
85/22 86/2 86/15 88/16
91/14 91/14 93/6 93/7 93/8
93/15 93/21 94/13 94/14
wanted [6] 9/12 17/7 23/6
49/22 49/23 65/24
wants [7] 4/16 4/21 35/22
37/23 53/1 74/25 88/17
warnings [2] 27/4 27/8
warnings -- all [1] 27/8
warrant [7] 38/15 52/2 52/2
52/6 66/8 66/8 95/25
warrants [3] 21/2 43/25
52/11
Washington [1] 1/14
wasn't [7] 7/4 12/13 12/13
52/6 52/6 88/11 89/22
waste [7] 33/7 33/11 33/23
80/10 81/25 82/8 83/12
wastes [1] 83/18
wasting [1] 93/10
watch [1] 32/9
Waters [1] 41/23
Waters's [1] 46/17
wave [1] 45/21
waves [1] 45/19
wax [1] 17/23
way [26] 4/9 4/25 16/17
17/18 18/5 20/23 23/25 30/3
34/1 36/13 36/14 39/8 43/11
43/16 63/21 63/24 64/3 70/4

way... [8] 70/13 70/19 73/23
75/1 75/10 79/18 85/12
95/11
we [309]
We -- and [1] 24/22
we -- I've [1] 25/5
we -- it [1] 19/1
we -- you [1] 24/5
we'd [4] 64/7 73/3 73/3 73/7
we'll [11] 10/18 13/22 39/22
63/21 71/4 75/3 79/5 79/17
85/25 92/18 96/10
we'll -- that [1] 63/21
we're [58] 4/23 5/14 7/5 7/5
7/18 7/18 8/21 9/20 9/20
10/1 10/14 10/21 11/1 11/14
11/25 12/1 12/18 13/11
13/13 14/1 18/18 20/11
23/21 29/17 29/23 30/1
36/17 39/7 40/11 45/15
49/23 55/4 58/23 61/19 63/1
64/7 66/12 69/10 69/12
69/23 69/24 70/2 71/6 72/23
73/9 74/7 74/12 75/25 76/13
76/18 76/20 78/25 79/19
79/23 79/25 88/21 95/13
95/14
we've [20] 9/14 15/7 24/21
29/11 35/16 40/6 44/19 50/4
62/21 64/11 65/13 65/23
66/17 68/22 75/2 79/6 81/4
87/6 87/10 87/22
we've -- the [1] 87/10
website [1] 25/17
Webull [5] 47/8 47/11
47/16 47/18 63/6
Wednesday [1] 12/2
week [2] 81/14 84/25
weeks [12] 13/25 20/24
29/14 43/18 48/14 64/1 69/5
71/9 81/13 83/7 84/25 93/4
weigh [4] 28/20 53/1 81/1
84/9

wind [1] 65/14
well [40] 5/23 7/3 10/4
18/24 24/4 25/6 29/22 37/8
38/20 40/3 42/25 49/19
53/11 55/22 56/9 56/16
56/17 56/23 57/22 58/5
58/12 59/5 62/5 62/16 63/3
63/19 64/23 64/24 69/2
70/11 73/8 73/25 74/6 74/19
85/2 85/14 87/23 88/10
88/19 91/24
went [8] 11/5 41/12 52/16
57/8 70/15 71/18 83/6 88/3
were [44] 5/5 6/14 6/16
6/17 7/17 17/21 18/15 22/24
23/5 26/11 27/7 28/2 28/9
37/15 41/21 41/22 43/18
44/6 44/6 44/15 45/6 46/2
49/4 50/11 50/19 52/21
54/13 56/4 60/6 60/6 63/13
63/16 73/20 73/22 76/12
88/3 88/7 88/12 89/4 89/5
89/13 89/23 89/25 90/14
were -- we [1] 63/16
weren't [4] 6/15 52/21
65/21 89/24
west [1] 69/18
Whac [1] 10/2
what -- when [1] 28/9
what's [8] 8/19 8/19 30/17
45/8 54/11 55/1 63/10 70/7
whatever [3] 41/15 61/16
88/11
whereby [1] 41/10
wherein [1] 18/21
whether [8] 23/14 45/8
58/25 61/3 64/15 73/17 76/5
77/10
which [52] 4/8 4/14 5/4
20/6 20/10 21/24 22/7 22/8
22/20 23/21 23/25 25/10
26/25 27/7 29/19 30/11 31/1
33/14 35/6 35/7 40/9 40/18
40/19 41/2 41/7 41/21 43/8

44/4 45/7 47/19 51/12 52/4
56/14 66/18 67/6 67/9 67/16
67/17 68/7 68/17 70/17
71/18 72/22 72/22 73/4 73/9
76/2 76/13 85/4 86/20 87/12
88/15
while [6] 6/14 10/9 21/13
64/6 69/4 89/14
whistleblower [1] 71/23
Whitley [2] 51/14 87/11
who [26] 4/6 4/16 5/13 7/24
8/19 9/8 15/7 21/9 32/12
35/22 36/23 36/23 37/4 51/4
52/12 55/12 60/6 64/21
72/11 74/25 75/16 75/23
82/22 89/13 90/9 94/11
who -- you [1] 8/19
who's [3] 8/19 31/13 52/10
Whoever [1] 53/1
whole [1] 30/1
wholesale [1] 37/3
whom [2] 32/22 72/11
why [41] 6/18 6/20 6/21 7/1
7/2 7/16 8/9 9/13 10/8 10/10
12/1 17/22 19/14 19/17
22/22 22/22 24/25 33/3 39/8
40/6 48/23 50/25 51/8 54/4
54/9 54/21 55/4 63/19 66/22
70/2 70/19 71/10 73/13
73/14 73/20 73/23 74/21
76/22 85/4 92/15 96/3
why -- and [1] 6/18
wife [8] 50/23 51/18 81/15
88/4 88/10 88/17 89/6 89/14
wife's [1] 52/20
will [40] 9/9 9/19 10/24
14/22 14/24 16/20 16/21
16/21 16/21 17/6 17/18 19/6
24/18 27/4 27/4 30/9 32/4
32/13 32/14 33/1 34/9 34/24
35/20 36/19 41/5 43/10
63/10 63/11 63/11 63/22
64/4 66/6 66/15 67/16 79/15
82/20 85/4 93/9 93/20 93/22

Will -- will [1] 27/4
WILLIAM [1] 2/5
WILLIAMS [4] 2/9 4/6
16/3 39/15
Williams' [1] 10/12
win [1] 13/16
wind [1] 47/18
windows [1] 69/7
wise [1] 75/1
within [8] 13/7 13/25 16/7
17/15 21/6 28/1 43/18 62/19
without [3] 16/24 48/15
48/16
witness [19] 21/9 52/11
52/12 53/16 60/20 66/5
66/14 66/19 69/13 71/15
77/15 82/22 83/12 95/1 95/6
95/10 95/14 96/3 96/4
witness's [1] 66/7
witnesses [9] 21/1 21/7
33/20 52/8 59/4 61/2 69/14
72/3 82/17
won't [2] 78/21 79/18
word [4] 33/17 59/11 70/18
71/17
work [12] 13/9 18/6 18/12
24/22 24/25 27/25 35/15
60/5 79/1 85/3 93/1 93/3
working [6] 12/1 15/16 25/6
25/6 27/10 32/18
works [1] 60/8
world [1] 72/15
worried [1] 79/25
worry [2] 82/24 93/1
worth [7] 11/3 54/6 65/23
71/2 71/3 93/5 93/15
would [75] 5/11 5/11 7/6
7/20 8/12 8/13 8/13 10/11
10/18 13/7 13/20 19/12
21/14 23/6 27/20 28/11 29/8
29/15 30/6 31/7 31/16 33/20
35/16 37/19 37/19 38/23
44/7 45/23 45/23 49/4 50/2

51/10 56/13 58/21 59/6
60/25 61/9 62/8 63/14 63/21
65/25 67/11 69/4 70/10
70/10 70/19 70/20 70/22
70/23 70/23 71/16 71/17
71/19 71/21 71/23 71/25
72/12 72/15 72/25 73/2 73/5
74/21 75/8 75/21 76/15 79/3
81/17 82/4 85/11 90/24 91/7
92/15 94/9 95/15 96/11
would -- **I** [1] 45/23
wouldn't [1] 90/20
write [2] 34/16 90/21
writing [1] 62/10
wrong [5] 6/7 11/13 12/1
47/24 56/24
wrote [2] 67/17 67/18

Y

y'all [16] 62/5 69/9 69/22
70/5 70/22 77/23 78/24
78/25 79/2 79/4 79/22 80/14
86/7 91/19 93/2 96/16
yeah [14] 9/19 53/8 63/3
67/19 68/2 68/3 71/8 75/7
84/13 84/19 85/24 89/10
89/18 94/18

year [7] 18/7 27/13 35/7
48/8 65/15 65/24 84/15
years [7] 14/25 16/7 44/24
62/22 75/20 81/11 81/11
years -- **almost** [1] 81/11
years' [1] 65/23

Yep [1] 88/23
Yes [10] 5/19 17/9 49/3
52/23 60/1 92/10 92/18
94/23 95/21 95/24

yesterday [3] 25/10 33/19
35/13

yet [4] 14/14 31/5 34/14
67/3

York [3] 1/13 1/24 1/24

you [288]

you -- **also** [1] 25/22

you -- **but** [1] 62/2

you -- **that** [1] 57/3

you -- **you** [1] 7/3

you'll [4] 25/9 48/25 79/13
93/13

you'll -- **I** [1] 25/9

you're [26] 6/6 8/7 8/7 8/23
8/24 9/3 9/5 10/9 18/17 56/3
56/12 56/24 56/25 57/3 57/4
58/7 58/12 58/17 61/11 74/8
74/21 85/17 89/12 89/17
92/6 94/25

you've [8] 26/13 29/2 29/5
57/15 57/23 67/13 85/18
93/16

young [1] 17/2

youngest [1] 81/13

your [136]

your -- **what** [1] 91/12

Your Honor [104]

Your Honor's [3] 65/6
84/15 85/24

Z

ZACHARY [2] 2/19 24/16
Zack [1] 54/5
ZADEH [3] 3/5 3/6 94/12
zero [1] 26/10